THE "PERJURY TRAP"

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> "Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury." [1]

> "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." [2]

Most experienced prosecutors would reject as nonsense the notion that they could indict anybody at any time for anything before any grand jury. They would, however, probably concede that their marksmanship improves when perjury is sought.[3] That is the subject of this Article: the deliberate use of the grand jury to secure perjured testimony, a practice dubbed by some courts the "perjury trap." [4]

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[1] Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972), *quoted in* United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (identical dissenting opinion in United States v. Dionisio, 410 U.S. 1, 18 (1973)).

[2] United States v. Remington, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

[3] "Perjury" is used in this Article to mean a witness's deliberately false swearing to a material matter in a judicial proceeding, here specifically a grand jury. Defined as such, six elements are required to prove perjury: (1) an oral statement; (2) that is false; (3) made under oath; (4) with knowledge of its falsity; (5) in a judicial proceeding such as a grand jury; (6) to a material matter. This definition accords with the general perjury statutes in effect in almost every American jurisdiction. *See, e.g.*, 18 U.S.C. § 1621 (1976); 18 U.S.C. § 1623 (1976 & Supp. III 1979); CAL. PENAL CODE § 118 (West 1970); MASS ANN. LAWS ch. 268, § 1 (Law. Co-op 1980); N.J. STAT. ANN. § 2A:131-1 (West 1969); N.Y. PENAL LAW § 210.15 (McKinney 1975). *See also* MODEL PENAL CODE § 241.1(1) (Prop. Off. Draft, 1962). Similarly, at common law perjury was defined as "a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely* and *falsely*, in a matter *material* to the issue or point in question." 4 W. BLACKSTONE, COMMENTARIES, * 136-37 (emphasis in original).

For discussions of the perjury penalty, see LAW REVISION COMMISSION, STATE OF NEW YORK, A STUDY OF PERJURY 233-343 (Legis. Doc. 60, 1935) [hereinafter cited as PERJURY REPORT]; MODEL PENAL CODE § 208.20, Comments (Tent. Draft No. 6, 1957); R. PERKINS, CRIMINAL LAW 453-66 (2d ed. 1969); 6 J. WIGMORE, EVIDENCE § 1831 (Chadbourn rev. 1976). *See also* Note, *An Analysis of New York's Perjury Law*, 40 ALB. L. REV. 198 (1975).

[4] People v. Tyler, 46 N.Y.2d 251, 258, 385 N.E.2d 1224, 1228, 413 N.Y.S.2d 295, 299 (1978); People v. Rao, 73 A.D.2d 88, 99, 425 N.Y.S.2d 122, 129 (1980).

Consider the following examples: (1) In the course of a grand jury probe of official corruption, the prosecutor summons a judge who is suspected of misconduct. Police surveillance has revealed that the judge recently held a lengthy conversation in a bar with a major organized crime figure. The judge is questioned before the grand jury and denies certain details of the meeting. He is indicted for perjury. (2) During an investigation into loansharking, law enforcement officials electronically intercept an arguably suspicious telephone conversation and summon one of the parties to the communication before a grand jury. When questioned by the prosecutor about the conversation, the witness denies its occurrence. He is indicted for perjury. (3) A grand jury has been conducting an inquiry into espionage. A prominent individual is subpoenaed and questioned about alleged communist activities occurring many years earlier. Because the statute of limitations has expired, the witness cannot be prosecuted for any substantive offense. The witness denies past involvement in communist activities. He is indicted for perjury.

These examples all embody elements of the prototypical perjury trap. In each case, the prosecutor suspected the witness of criminal activity and proof existed to bear out that suspicion. None of the individuals could be prosecuted for a substantive crime

See, e.g., Brown v. United States, 245 F.2d 549, 555 (8th Cir. 1957) ("The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt."); State v. Redinger, 64 N.J. 41, 50, 312 A.2d 129, 134 (1973) (witness "was allowed to walk into a waiting charge of perjury"); People v. Brust, N.Y.L.J., Dec. 2, 1976, at 12, col. 2 (Sup. Ct.) ("a calculated effort to develop and preserve perjury counts").

This author's experience both as a prosecutor and defense attorney leads him to conclude that some prosecutors routinely question witnesses in the grand jury with the deliberate design of "setting up" the witness for a perjury charge. For example, a recent decision by a New York appellate court alluded to an interoffice memorandum of the Organized Crime Section of the New York Police Department that stated: "The strategy of this investigation is to use the 'Grand Jury' approach, that is to obtain 'hard-fast' information on persons prominent in the investigation, serve them with Grand Jury subpoenas, grant them limited immunity to particular facts and attempt to make contempt and perjury cases against them." People v. DeMartino, 71 A.D.2d 477, 486, 422 N.Y.S.2d 949, 956 (1979).

Reporting on the difficulty of perjury prosecutions, a seminal report on crime in the United States observed: "The present special proof requirements in perjury cases [the "two-witness" rule, *see* note 10 *infra*] inhibit *prosecutors from seeking perjury indictments* and lead to much lower conviction rates for perjury than for other crimes." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 201 (1967) (emphasis added) [hereinafter cited as PRESIDENT'S REPORT].

The possibility that prosecutors might summon witnesses into grand juries with the premeditated purpose of obtaining perjured testimony was commented on by the drafters of the Model Penal Code: "There is disturbing opportunity for abuse in conducting inquiries into ancient misdeeds of the witness, with the object of eliciting a denial that can then be charged as perjury . . . ." MODEL PENAL CODE § 208.20, Comments (Tent. Draft No. 6, 1957).

either because insufficient proof existed or because of a legal bar.[5] Sufficient evidence existed to prove false the witnesses' denials. The witnesses were prominent or notorious persons against whom an indictment for perjury would invite public approval as well as demonstrate effective law enforcement.[6] In each case, it could be argued that the prosecutor, frustrated at his inability to indict the suspect witness for a substantive crime, purposefully sought to induce the witness to testify in a manner that the prosecutor knew could be contradicted by sufficient independent evidence, thereby subjecting the witness to prosecution for perjury. In other words, as a hypothetical prosecutor might candidly acknowledge: "If we can't get him for a real crime, we'll get him for perjury." [7]

Strangely, while a myriad of claimed grand jury abuses and correlative proposals for reform have received wide attention,[8] the perjury trap has largely escaped comment or criticism. This is puzzling for a number of reasons. First, any discussion of the perjury trap raises disturbing questions of arguably constitutional magnitude. The prosecutor's use of the grand jury, not to uncover antecedent crime, but to cause perjury to be committed, implicates fundamental notions of fairness. The awesome powers of investigating grand juries, the limited rights of witnesses, the secrecy of the interrogation, and the harsh intolerance of perjured

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[5] Of course, a prosecutor ordinarily will prefer obtaining a conviction for a substantive offense to obtaining a perjury conviction. Substantive convictions may well carry greater criminal penalties than perjury convictions, and may result in greater popular and professional approval. Thus, the perjury trap will be most appealing to the prosecutor only when he or she is unable, or unlikely, to obtain a substantive conviction. *See* note 11 *infra.*

[6] In such cases the prosecutor has powerful incentives to obtain the conviction *of the particular individual* for any offense, rather than the conviction of *anyone* for a particular substantive offense. *See* note 5 *supra.*

[7] In the three foregoing examples, a perjury trap was found in the first case, People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978), no perjury trap was found in the second case, United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), *cert. denied,* 425 U.S. 935 (1976), and the issue was neither raised nor considered in the third, United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied,* 340 U.S. 948 (1951).

[8] *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *Grand Jury Reform*]; ABA SECTION OF CRIMINAL JUSTICE, POLICY ON THE GRAND JURY (1977); Antell, *The Modern Grand Jury: Beknighted Supergovernment,* 51 A.B.A. J. 153 (1965); Johnston, *The Grand Jury-Prosecutorial Abuse of the Indictment Process,* 65 J. CRIM. L. & C. 157 (1974); Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?,* 55 COLUM. L. REV. 1103 (1955); Newman, *The Suspect and the Grand Jury: A Need for Constitutional Protection,* 11 RICH. L. REV. 1 (1976); Rodis, *A Lawyer's Guide to Grand Jury Abuse,* 14 CRIM. L. BULL. 123 (1978); Shannon, *Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?,* 2 N.M. L. REV. 141 (1972); Tigar & Levy, *The Grand Jury as the New Inquisition,* 50 MICH. ST. B.J. 693 (1971).

testimony, all provide a natural setting for oppression and deceit. In such circumstances, the protections offered by the due process clause seem especially appropriate, and perhaps necessary.[9]

Second, the occasion for a prosecutor to utilize the perjury penalty may be greater today than ever before. This is particularly true in areas of white collar, organized, and official crime, as is evidenced, for example, by the remarkable increase in the incidence of perjury prosecutions since the passage of the Organized Crime Control Act of 1970.[10] Third, because of the inherently difficult

[9] Over the past eight years the Supreme Court has decided seven cases dealing specifically with the powers of grand juries and the rights of witnesses summoned before such bodies. In every case, the Court has reaffirmed the grand jury's vast inquisitory powers and the inapplicability of constitutional safeguards to witnesses. United States v. Washington, 431 U.S. 181 (1977) (grand jury witness need not be warned prior to testifying that he is potential defendant and subsequent testimony can be used against him); United States v. Wong, 431 U.S. 174 (1977) (failure to advise grand jury witness of right to remain silent no bar to perjury prosecution for giving false testimony); United States v. Mandujano, 425 U.S. 564 (1976) (plurality opinion) (failure to advise grand jury witness of right to remain silent and right to counsel no bar to perjury prosecution for giving false testimony); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness had no right to refuse to answer questions that were based on illegally obtained evidence); United States v. Mara, 410 U.S. 19 (1973) (witness may be compelled to furnish grand jury with samples of his handwriting); United States v. Dionisio, 410 U.S. 1 (1973) (witness may be compelled to furnish grand jury with recording of his voice); Branzburg v. Hayes, 408 U.S. 665 (1972) (newspaper reporter has no constitutional right to refuse to answer questions before grand jury).

The Supreme Court's broad support of the grand jury is in stark contrast to the fears expressed by many that the grand jury is a law enforcement tool used to oppress citizens. *See* authorities cited note 8 *supra*. On the dangers of ex parte interrogation, Justice Black observed:

> Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of "statements" by one means or another from an individual by officers of the state while he is held incommunicado. I reiterate my belief that it violates the Due Process Clause to compel a person to answer questions at a secret interrogation where he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by government officials. Such procedures are a grave threat to the liberties of a free people.

In re Groban, 352 U.S. 330, 352-53 (1957) (Black, J., dissenting) (footnotes omitted).

[10] The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 7, 11, 12, 15, 16, 18, 19, 21, 28, 29, 33, 42, 45, 46, 47, 49, 50, 50 App. U.S.C.), was enacted in response to the report by the President's Commission on Law Enforcement and Administration of Justice contending, *inter alia*, that law enforcement lacked sufficient resources, coordination, and public and political commitment to deal comprehensively with organized crime. PRESIDENT'S REPORT, *supra* note 4, at 198-200. With respect to perjury, the Com-

task of proving substantive violations in the area of organized crime and official corruption, a prosecutor may be encouraged to lure into perjury persons suspected of wrongdoing who might otherwise escape prosecution.[11] Finally, the perjury trap is not merely

mission concluded that the present sanction was not sufficiently effective as a deterrent. "Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony." *Id.* 201. As a result, Congress included in the Organized Crime Control Act a new perjury statute, 18 U.S.C. § 1623 (1976 & Supp. III 1979), which, according to the committee sponsoring the law, "will not be circumscribed by rigid common law rules of evidence" and "will offer greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." *See* S. REP. No. 617, 91st Cong., 1st Sess. 59 (1969) [hereinafter cited as SENATE REPORT]. This statute, entitled "False Declarations Before Grand Jury or Court," provides that whoever knowingly and materially falsely swears before any court or grand jury is punishable by up to five years imprisonment and a fine of $10,000. Under traditional proof requirements in perjury cases, two witnesses or one witness plus corroboration was necessary. *See* Weiler v. United States, 323 U.S. 606 (1945); Hammer v. United States, 271 U.S. 620 (1926); Comment, *Proof of Perjury: The Two Witness Requirement*, 35 S. CAL. L. REV. 86 (1961). However, under the new federal perjury statute, no particular number of witnesses or special kinds of proof is necessary for conviction. 18 U.S.C. § 1623(e). The constitutionality of this statute has been upheld over attacks based on the lessened proof requirements. *See* United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973).

In the five years preceding the passage of 18 U.S.C. § 1623 in 1970, 348 perjury prosecutions were brought by the United States Department of Justice. In the eight years following passage of the new perjury statute, the number of perjury prosecutions tripled. Moreover, during the same eight-year period, the number of perjury prosecutions (1,516) exceeded the number of prosecutions for all crimes commonly associated with organized crime and official corruption except anti-racketeering (1,786), with bribery (1,216), anti-gambling (1,187), extortion (94) and contempt (511) following. *See* [1978] ATT'Y GEN. ANN. REP. 74-75; [1977] ATT'Y GEN. ANN. REP. 94-95; [1976] ATT'Y GEN. ANN. REP. 74-75; [1975] ATT'Y GEN. ANN. REP. 17-20; [1974] ATT'Y GEN. ANN. REP. 12-13; [1973] ATT'Y GEN. ANN. REP. 10-11; [1972] ATT'Y. GEN. ANN. REP. 18-19; [1971] ATT'Y GEN. ANN. REP. 16-17.

Similarly, state prosecutors rely heavily on perjury prosecutions, particularly in the areas of organized crime and corruption. *See, e.g.*, SPECIAL STATE PROSECUTOR, STATE OF NEW YORK, ANNUAL PROGRESS REPORT 5, 22, 28 (1979).

[11] The difficulty of proving substantive violations in the areas of organized crime, *see* PRESIDENT'S REPORT, *supra* note 4, at 198-99, applies with equal force to investigations into white collar crime and official corruption. In these areas, there are ordinarily no complaining victims or eyewitnesses, and the criminal activity is characterized by clandestine and sophisticated behavior, with the parties usually in mutual agreement. Moreover, there is unlikely to be any proof of criminality such as instrumentalities of crime, contraband, or other visible evidence upon which law enforcement ordinarily relies. Accordingly, when faced with uncooperative and recalcitrant witnesses in the grand jury, a prosecutor might understandably rely heavily on the perjury penalty to facilitate an effective investigation.

Even when accomplices to crime are willing to cooperate with the government, some jurisdictions, such as New York, have special evidentiary rules requiring independent corroboration of the accomplice's testimony before a conviction for a substantive offense may be obtained. *See* N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1971). However, corroborative proof of the accomplice's testimony is not required to charge a defendant with perjury based on testimony inconsistent with that given by the accomplices. *See* People v. McAuliffe, 36 N.Y.2d 820, 331 N.E.2d 681, 370 N.Y.S.2d 900 (1975) (per curiam).

of abstract or theoretical significance. Recently in New York, perjury charges against two judges,[12] two prominent lawyers,[13] and the leader of the State Assembly[14] were dismissed because the prosecutors' purpose was to trap the defendants into giving false testimony.

Although courts have frequently suggested that it is impermissible for a prosecutor to deliberately trap a witness into perjury,[15] this principle has not been closely analyzed. In particular, it is

A prosecutor's use of perjury as a subterfuge when he or she is unable to prove the substantive offense is disquieting for other reasons. A prosecutor who cannot obtain sufficient evidence of substantive violations against a notorious member of organized crime or a high public official suspected of corruption may consider it justifiable to subject those individuals to prosecutions for other crimes such as tax evasion and traffic offenses as well as perjury. It has been argued that the exercise by a prosecutor of such arbitrary discretion is "the very antithesis of a rule of law, and a serious violation of his professional responsibility." Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 3 CRIM. L. BULL. 544, 546 (1967). *See* Annot., 45 A.L.R. FED. 732 (1979). Cases that have found prosecutorial discrimination include United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (federal census violation); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (prosecution for disruptive behavior on federal property). *See also* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (selective service violation). *But see* United States v. Palermo, 152 F. Supp. 825 (E.D. Pa. 1957).

Finally, the incidence of well-known perjury prosecutions in the early 1950s for denials of communist affiliation, particularly when the prosecutor could not have charged substantive violations because of the passage of the statute of limitations, is deeply disturbing in that it readily suggests an inquisitorial purpose to seek perjury when no other charge is available. *See* United States v. Lattimore, 215 F.2d 847, 862-69 (D.C. Cir. 1954) (Edgerton, J., concurring); United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). One commentator stated: "[T]oday there is an ominous use of perjury indictments against persons who have allegedly lied about acts barred from prosecution by the statutes of limitations." Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 650 (1954). There are also first amendment implications in this practice, as Professor Zechariah Chafee pointed out:

> I am disturbed by the growing use of perjury prosecutions to bypass the Statute of Limitations. One of the main purposes of this statute is to protect innocent persons who might not be able to defend themselves against a charge of an antiquated crime, because of the difficulty of digging up recollections and documents about events a dozen years old, especially when they seemed of no importance at the time. Getting a man prosecuted for perjury if the grand jury happens to disagree with his memory of events long buried appears to be legally valid but it is nothing to be proud of.

Z. CHAFEE, THIRTY-FIVE YEARS WITH FREEDOM OF SPEECH 28-29 (1952).

[12] People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978); People v. Brust, N.Y.L.J., Dec. 2, 1976, at 12, col. 2 (Sup. Ct.).

[13] People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (1980); People v. Monaghan, N.Y.L.J., Nov. 14, 1975, at 8-10, col. 2 (Sup. Ct.), *aff'd*, 55 A.D.2d 1056, 391 N.Y.S.2d 778 (1977).

[14] People v. Blumenthal, N.Y.L.J., Apr. 16, 1976, at 7-8, col. 3 (Sup. Ct.), *aff'd*, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1976), *appeal denied*, 41 N.Y.2d 1011, 395 N.Y.S.2d 1029 (1977).

[15] United States v. Chevoor, 526 F.2d 178, 185 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Devitt, 499 F.2d 135, 140 (7th Cir. 1974),

necessary to examine the theoretical basis of the principle: Is the perjury trap a subspecies of entrapment in the traditional sense? Absent a firm theoretical foundation, application of the prohibition against perjury traps will continue to be imprecise and ad hoc. The entrapment defense, already confused, will become even more uncertain when invoked to excuse perjury.

Plainly, the subject demands careful analysis. It is the aim of the present Article, first, to explore the boundaries of legitimate grand jury interrogation as it bears on the subject of perjury and, second, to formulate guidelines that strike a balance between the needs of the investigatory process and the rights of witnesses.

I. The Elements of the Perjury Trap

A. *The Investigating Grand Jury*

The grand jury occupies a special role in the criminal justice system.[16] Commonly described as "'part of the judicial proc-

cert. denied, 421 U.S. 975 (1975); Bursey v. United States, 466 F.2d 1059, 1080 (9th Cir. 1972); LaRocca v. United States, 337 F.2d 39, 42-43 (8th Cir. 1964); Masinia v. United States, 296 F.2d 871, 877 (8th Cir. 1961); Brown v. United States, 245 F.2d 549, 555 (8th Cir. 1957); Commonwealth v. Borans, Mass. Adv. Sh. (1979) 2349 (Sept. 4, 1979) (citing People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978)). *Cf.* United States v. Jacobs, 547 F.2d 772, 775 (2d Cir. 1976) (court's supervisory power exercised to dismiss perjury indictment); United States v. Cross, 170 F. Supp. 303, 309 (D.D.C. 1959) (perjury before Senate committee); United States v. Icardi, 140 F. Supp. 383, 388 (D.D.C. 1956) (perjury before congressional subcommittee).

[16] United States v. Calandra, 414 U.S. 338, 343 (1974). The Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V.

There are basically two types of grand juries. The "indicting grand jury" hears evidence concerning a specific crime and decides whether the evidence is sufficient to indict for that crime. The "investigating grand jury" inquires into general areas of crime with the objective of uncovering evidence to charge crime. The statutes generally do not distinguish between the two functions and can accommodate both. *See* N.Y. Crim. Proc. Law § 190.05 (McKinney 1971) ("the functions [of the grand jury] are to hear and examine evidence concerning offenses and concerning misconduct, nonfeasance and neglect in public office").

The indicting grand jury has been criticized as a "rubber stamp" of the prosecutor. The chairman of the congressional subcommittee that held hearings in 1977 on grand jury problems stated: "All of our witnesses last session conceded that in 95 percent of the cases, the grand jury merely ratifies the decision of the Government attorney to prosecute or not to prosecute." *Grand Jury Reform, supra* note 8, at 2. The subcommittee proposed a constitutional amendment that would eliminate the indicting grand jury and replace it with a prosecutor's information stating the essential facts of the crime charged. *Id.* 999-1000.

The investigating grand jury, on the other hand, is considered a powerful law enforcement weapon in the areas of organized crime and official corruption. *See* Senate Report, *supra* note 10, at 47-48; President's Report, *supra* note 4, at 200. Special grand juries have been authorized in recent years specifically for the purpose of investigating organized crime and official corruption. *See* 18 U.S.C.

ess," [17] or "an arm of the court," [18] the grand jury is one of the most powerful instruments in the arsenal of law enforcement.[19] Historically the grand jury was the accuser of the guilty and protector of the innocent,[20] but today there seems to be an unmistakable

§ 3331 (1976) (enacted to "[strengthen] the Federal grand jury system to deal with organized crime," SENATE REPORT, *supra* note 10, at 48); N.Y. Code of Rules and Regulations tit. 9, §§ 1.55-.59 (1972) (executive order of the Governor of the State of New York authorizing the impaneling of special grand juries to investigate corruption in New York City). The proposed constitutional amendment discussed above, while abolishing the indicting grand jury, would retain the investigating grand jury.

Although indictment by a grand jury is not required by the due process clause of the fourteenth amendment to be afforded state criminal defendants, Hurtado v. California, 110 U.S. 516 (1884), every state authorizes the grand jury either as a required procedure for initiating a criminal prosecution or "as an investigative tool." Branzburg v. Hayes, 408 U.S. 665, 688 n.25 (1972).

This Article deals solely with the work of investigating grand juries. Of course, procedural due process issues may also be implicated in the setting of an indicting grand jury. *See, e.g.*, Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978). The ex parte interrogation of witnesses with the objective of uncovering antecedent crime, however—the context in which the perjury trap occurs—involves almost exclusively the investigatory function of the grand jury, rather than the relatively formalistic indicting function.

[17] Cobbledick v. United States, 309 U.S. 323, 327 (1940).

[18] Levine v. United States, 362 U.S. 610, 617 (1960); SENATE REPORT, *supra* note 10, at 47-51 (proposing, *inter alia*, a "Special Grand Jury" to investigate organized crime); M. FRANKEL & G. NAFTALIS, THE GRAND JURY 20 (1977). A grand jury investigation has been characterized as "a judicial inquiry." Hale v. Henkel, 201 U.S. 43, 66 (1906).

[19] The grand jury has been referred to as "a prosecutorial agency." United States v. Sweig, 316 F. Supp. 1148, 1153 (S.D.N.Y.), *aff'd*, 441 F.2d 114 (2d Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *accord*, United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959) (grand jury, "a law enforcement agency"). The grand jury, "a powerful instrument" with an "awesome range of powers," "investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted." M. FRANKEL & G. NAFTALIS, *supra* note 18, at 4-5, 100. Justice Douglas wrote: "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (identical dissenting opinion rendered in United States v. Dionisio, 410 U.S. 1, 18 (1973)). A prosecutor cannot compel the attendance of witnesses; a grand jury can. Kastigar v. United States, 406 U.S. 441, 443 (1972). A prosecutor cannot compel the production of documents; a grand jury can. Hale v. Henkel, 201 U.S. 43 (1906). A prosecutor cannot compel testimony; a grand jury can. United States v. Mandujano, 425 U.S. 564, 572 (1976). Moreover, the grand jury proceeding is conducted in secret, without the supervision of a judge. United States v. Calandra, 414 U.S. 338, 343 (1974); Blair v. United States, 250 U.S. 273 (1919).

[20] The grand jury originated in England in 1166 when King Henry II's Assize of Clarendon established a Grand Assize composed of local gentry to investigate for the King and enforce his law against the Church and the feudal barons. Five hundred years later, in the College and Shaftsbury cases, the grand jury asserted its role as a shield against oppressive prosecution. For a history of the grand jury, see J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 305-24 (1836); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 321-23 (7th rev. ed. 1956); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 151 (2d ed. 1909). For a history of the grand jury in America, see R. YOUNGER, THE PEOPLE'S PANEL, THE GRAND JURY IN THE UNITED STATES 1634-1941 (1963).

emphasis on ex parte investigation and accusation as opposed to exoneration.[21] This may be due in large measure to the close relationship between the grand jury and the prosecutor—theoretically its "legal advisor," [22]—the understandable dependence upon the prosecutor by the grand jury for its successful operation,[23] and the natural impulse of any investigating agency to accuse.[24]

The extraordinary breadth of the grand jury's investigative powers has been consistently reaffirmed. The Supreme Court has repeatedly characterized the grand jury as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts

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[21] *See* Note, *The Grand Jury: Powers, Procedure and Problems*, 9 COLUM. J.L. & SOC. PROB. 681 (1973); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961). Plainly, the claimed necessity for and the actual empanelment of special investigating grand juries, *see* note 16 *supra*, would indicate a public interest in vigorous investigation of crime.

[22] *See* N.Y. CRIM. PROC. LAW § 190.25(6) (McKinney 1971). The U.S. Attorneys' Advisory Committee recently opposed recording prosecutorial comments to the grand jury, claiming that such a procedure would "formalize what should be an informal working relationship between grand jurors and government attorneys." *Grand Jury Reform*, *supra* note 8, at 193.

[23] Courts and commentators invariably observe that "the grand jury summoned the witness," "the grand jury questioned the witness," "the grand jury indicted the defendant." Technically this is accurate, although in reality it is a distortion. The grand jury is in many ways a legal fiction, clothing with respectability, neutrality and independence what are in truth the actions of the prosecutor.

An excellent study of the grand jury by a former federal jurist and a former federal prosecutor states:

> The show is run by the prosecutors. . . . The prosecutors decide what is to be investigated, who will be brought before the grand jurors, and—practically and generally speaking—who should be indicted for what. . . .
>
> Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor 'submits' that it should. Not surprisingly, the somewhat technical, somewhat complex, occasionally arcane language of indictments is drafted by the prosecutor and handed to the grand jury foreman or forelady for the signature which is almost invariably affixed.
>
> It could not more than rarely be otherwise. In a busy, densely populated, elaborately organized society—where crime is rife, criminals are tough, many wrongs are mysterious and concealed from laymen—law enforcement is inescapably for professionals. The very notion of the grand jury as beneficent for a free society would be subverted by a band of amateurs engaged in sleuthing, summoning, indicting, or not indicting as their 'independent' and untutored judgment might dictate. Privacy, security, and reputation would be in steady jeopardy. Sophisticated criminals would be safe; innocent citizens would be less safe.

M. FRANKEL & G. NAFTALIS, *supra* note 18, at 21-23.

[24] Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 594 (1961).

whether any particular individual will be found properly subject to an accusation of crime." [25]

In accord with the oft-stated principle that "the public has a right to every man's evidence," [26] this modern inquisitorial body is empowered to summon any person before it and, subject to modest constraints imposed by the fourth [27] and fifth [28] amendments, to compel that person to disclose under oath everything he or she knows about the matter under inquiry.[29] "[T]he witness is bound

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[25] Blair v. United States, 250 U.S. 273, 282 (1919). *See* United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

[26] United States v. Nixon, 418 U.S. 683, 709 (1974). Since Chief Justice Marshall's famous decision nearly two centuries ago in United States v. Burr, 25 F. Cas. 38 (C.C.D. Va. 1807), this principle has been "long accepted in America as a hornbook proposition." United States v. Mandujano, 425 U.S. 564, 572 (1976).

[27] The fourth amendment limits the scope of a grand jury subpoena for documents to information that is reasonably related to the grand jury's investigation. *See* See v. City of Seattle, 387 U.S. 541 (1967) (dictum); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906). See also *In re* Horowitz, 482 F.2d 72 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 867 (1973), in which it was suggested that restrictions on overbroad subpoenas derive not from the fourth amendment but from the due process clause. However, challenging a subpoena on grounds of overbreadth is obviously difficult in view of the wide latitude accorded investigating grand juries to probe for information "in order to determine the question whether the facts show a case within [the grand jury's] jurisdiction." Blair v. United States, 250 U.S. 273, 283 (1919).

An indictment valid on its face is not subject to challenge on the ground that evidence supporting the charges was obtained in violation of the fourth amendment. United States v. Calandra, 414 U.S. 338, 344-45 (1974). Similarly, a witness is required to respond to questions concededly predicated on evidence obtained in violation of his or her fourth amendment rights. *Id.* 350.

[28] The fifth amendment's guarantee against self-incrimination often figures prominently in protecting grand jury witnesses. United States v. Mandujano, 425 U.S. 564 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892). However, the privilege may properly be overridden by a grant of immunity. Kastigar v. United States, 406 U.S. 441 (1972). *See* United States v. Apfelbaum, 445 U.S. 115 (1980). *See* note 91 *infra*.

As in the case of the fourth amendment, an indictment is not subject to attack even though the evidence supporting the charge was obtained in violation of the fifth amendment. Lawn v. United States, 355 U.S. 339 (1958). Similarly, a witness may not avoid answering a question on the grounds that it is predicated on information obtained in violation of the fifth amendment. United States v. Weir, 495 F.2d 879 (9th Cir. 1974).

[29] United States v. Calandra, 414 U.S. 338, 343 (1974). "Probing questions to all types of witnesses is the stuff that grand jury investigations are made of . . . ." United States v. Mandujano, 425 U.S. 564, 573 (1976).

A grand jury cannot literally compel a recalcitrant witness to testify. However, the contempt power permits a court to impose penal sanctions upon a witness who refuses to testify. *See* United States v. Barnett, 376 U.S. 681 (1964); R. GOLDFARB, THE CONTEMPT POWER 105-14 (1963); Note, *Coercive Contempt and the Federal Grand Jury*, 79 COLUM. L. REV. 735 (1979). The contempt power of courts and the attendant procedures are defined by statute. *See, e.g.*, 18 U.S.C. § 401 (1976); N.J. STAT. ANN. § 2A:10-1-2A:10-7 (West 1952 & Supp. 1980); N.Y. PENAL LAW §§ 215.50, 215.51 (McKinney 1975).

not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." [30] Moreover, as a general rule, a witness may not challenge the questions as incompetent or irrelevant nor object that the grand jury is exceeding its authority, "for this is no concern of [the witness]," his role being simply to testify truthfully to what he knows.[31]

It is thus not surprising that the rights of witnesses, when balanced against the broad powers of the grand jury, are severely attenuated. Recent decisions of the Supreme Court have done little to alter this balance of power.[32] In 1976, for example, the Court held that a witness has no right to remain silent before a grand jury but, rather, "has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim." [33] The prosecutor, however, has no obligation to advise the witness of his fifth amendment right.[34] Similarly, there is no requirement to warn the witness of his duty to tell the truth or, conversely, of the dangers of testifying falsely.[35] Nor does a grand jury witness have

The sanctions of perjury and contempt have the common purpose of forcing witnesses to give truthful testimony. While this Article deals with the case of a prosecutor abusing the perjury sanction, it has been suggested that the contempt sanction could be similarly abused by a prosecutor who deliberately traps a witness into committing contempt. *See* Raley v. Ohio, 360 U.S. 423 (1959); People v. Rappaport, 47 N.Y.2d 308, 391 N.E.2d 1284, 418 N.Y.S.2d 306, *cert. denied*, 444 U.S. 964 (1979); People v. Schenkman, 46 N.Y.2d 232, 385 N.E.2d 1214, 413 N.Y.S.2d 284 (1978).

[30] Blair v. United States, 250 U.S. 273, 282 (1919).

[31] *Id.* "[The witness] is not entitled to urge objections of incompetency or irrelevancy . . . . [H]e is not entitled to challenge the authority of the court or of the grand jury . . . . He is not entitled to set limits to the investigation that the grand jury may conduct." *See also* Costello v. United States, 350 U.S. 359, 362 (1956) (indictment valid on its face not subject to challenge on the ground that grand jury acted on the basis of inadequate or incompetent evidence). *But see* United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (Friendly, J.).

[32] *See* cases cited in note 9 *supra.*

[33] United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion). The fifth amendment privilege historically has been available to a grand jury witness. Counselman v. Hitchcock, 142 U.S. 547 (1892).

[34] United States v. Mandujano, 425 U.S. 564, 580 (1976); United States v. Chevoor, 526 F.2d 178, 181 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. DiMichele, 375 F.2d 959, 960 (3rd Cir.), *cert. denied*, 389 U.S. 838 (1967). In *Mandujano*, the Supreme Court observed that any warning given to a grand jury witness of an absolute right to silence "obviously . . . would be incorrect, for there is no such right before a grand jury." 425 U.S. at 580. The Court declined to determine whether a grand jury witness must be warned of his fifth amendment right against self incrimination. *Id.* 582 n.7. However, the tenor of recent Supreme Court decisions delineating the rights of grand jury witnesses suggests that no such warning would be mandated, particularly when the witness has perjured himself.

[35] United States v. Mandujano, 425 U.S. 564, 581-82 (1976).

a right to the assistance of counsel inside the grand jury room.[36] Finally, persons implicated in criminal activity and even those "targeted" for prosecution are required to appear and testify before the grand jury.[37] Indeed, such "putative defendants" have no right to a warning regarding their perilous situation.[38]

[36] *Id.* 581. The question whether a grand jury witness has a right to counsel inside the grand jury room has generated considerable debate. In *Mandujano*, a plurality of four Justices took the view that "[n]o criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play," *id.* 581; two Justices took the position that such a right exists (Brennan, J. and Marshall, J., concurring); the other two Justices deciding the case took no position on this issue (Stewart, J. and Blackmun, J., concurring). (Stevens, J., took no part in the consideration or decision of the case.) The federal jurisdictions and most states do not permit counsel inside the jury room, although they generally permit the witness to leave the grand jury room to consult with counsel prior to answering any given question. *Id.* 606-07, n.23 (Brennan, J., concurring). This practice is not absolute, however. *See In re* Tierney, 465 F.2d 806, 810 (5th Cir. 1972) (denial of consultation upheld "to prevent a breakdown in the grand jury proceedings by frequent departures from the grand jury room for frivolous reasons and with intent to frustrate the proceedings"); People v. Ward, 37 A.D.2d 174, 177, 323 N.Y.S.2d 316, 319 (1971) ("no right to consultation in the midst of grand jury testimony for mere strategic advice").

Presently, thirteen states allow counsel to be present inside the grand jury room under varying circumstances. *See* ARIZ. REV. STAT. ANN. vol. 17, § 12.5 (West 1973) (for witnesses under investigation); COLO. REV. STAT. § 16-5-204 (1978) (no limitation); ILL. ANN. STAT. ch. 38, § 112-4.1 (Smith-Hurd 1980) (for witnesses against whom indictment is being sought); KAN. STAT. ANN. § 22-3009 (1974) (no limitation); MASS. ANN. LAWS ch. 277, § 14A (Law. Co-op 1980) (no limitation); MICH. COMP. LAWS ANN. § 767.3 (1968) (no limitation); MINN. STAT. ANN. vol. 49, § 18.04 (West 1976) (if witness waives immunity); N.Y. CRIM. PROC. LAW § 190.45 (McKinney 1971) (if witness waives immunity); OKLA. STAT. ANN. tit. 22, § 340 (West 1971 & Supp. 1979) (no limitation); S.D. COMP. LAWS ANN. § 23A-5-11 (1970) (no limitation); UTAH CODE ANN. § 77-19-3 (Smith Allen 1978) (no limitation); VA. CODE § 19.2-209 (Michie 1975) (only before special grand jury); WASH. REV. CODE ANN. § 10.27.080 (West Supp. 1979) (no limitation).

The American Law Institute supports counsel in the grand jury room, *see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 5340.3(1) (Prop. Off. Draft, 1975), as does the American Bar Association. *See* ABA SECTION OF CRIMINAL JUSTICE, Report No. 115 (1977). A bill before Congress would authorize the presence of counsel in the grand jury room. *See* H.R. 94, 95th Cong., 1st Sess. (1977), *reprinted in Grand Jury Reform*, *supra* note 8, at 982-83.

Commentators generally favor counsel in the grand jury room. *See* Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807 (1972); Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1966); Newman, *supra* note 8; Note, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97. *But see* Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293 (1978).

[37] United States v. Wong, 431 U.S. 174, 179 n.8 (1977); United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973).

[38] United States v. Washington, 431 U.S. 181 (1977). The American Bar Association has favored a rule requiring a prosecutor to advise a witness that he may be a potential defendant. Section 3.6(d) of the ABA's standards relating to the prosecution function provides: "If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights." ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION §3.6(d) (App. Draft, 1971).

B. *The Crime of Perjury*

Perjury has always been considered one of the most odious crimes in our law. Hawkins said that perjury 'is of all Crimes whatsoever the most Infamous and Detestable." [39] Sir James Stephen noted that "[w]hoever gives false evidence must be thrown from the Tarpeian rock." [40] Under the Code of Hammurabi, the Roman law, and the French law, death was the punishment for bearing false witness.[41] In the colony of New York, punishment included branding the letter "P" on the offender's forehead.[42] The courts today refer to "the pollution of perjury." [43] Chief Justice Burger recently said, "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." [44]

That perjury should be viewed with such outrage is not surprising. False testimony seriously threatens the fair and effective administration of justice. An individual's life, liberty, or property may be lost because of perjured testimony.[45] Similarly, the protection of the public may be undermined by perjury. In particular, crimes relating to corruption of public officials, such as bribery, extortion, and obstruction of justice, may be shielded from detection by perjured testimony.[46] Moreover, because of the requirement of an oath, perjury retains a sacrilegious character. Penal sanctions provide temporal punishment; violating an oath suggests ultimate

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[39] 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 172 (1724).

[40] 1 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 11 (1883).

[41] *See* PERJURY REPORT, *supra* note 3, at 251-53. *See also* S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 160 (1978).

[42] LAWS OF THE COLONY OF NEW YORK (1 COLONIAL LAWS OF NEW YORK, 1664-1719, ch. 8, 129), entitled "An Act to prevent willful Perjury."

[43] Bronston v. United States, 409 U.S. 352, 357 (1973); United States v. Williams, 341 U.S. 58, 68 (1951); United States v. Neff, 212 F.2d 297, 302 (3d Cir. 1954).

[44] United States v. Mandujano, 425 U.S. 564, 576 (1976).

[45] United States v. Norris, 300 U.S. 564, 574 (1937) ("Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal."). Convictions based on perjured testimony violate due process. *See* Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). *See generally* Annot., 11 A.L.R. 3d 1153 (1967).

[46] *See* United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Beitling, 545 F.2d 1106 (8th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977); United States v. Sisack, 527 F.2d 917 (9th Cir. 1975); United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975); United States v. Dowdy, 479 F.2d 213 (4th Cir. 1973); United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973); United States v. Winter, 348 F.2d 204 (2d Cir. 1965). *See also* PRESIDENT'S REPORT, *supra* note 4, at 200-01.

punishment by a supernatural power.[47] The "solemnity of the oath" [48] is graphically illustrated by rule 603 of the Federal Rules of Evidence: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." [49]

Perjury is considered so inimical to the fair administration of justice that the detection and prosecution of perjurers has largely outweighed their rights. Thus, the failure of the government to warn a witness of his constitutional rights does not thereby preclude prosecution for subsequent false testimony.[50] Moreover, although the government compels an individual to answer improper questions, or compels answers that would violate the individual's constitutional rights, prosecution for false answers is nevertheless permissible.[51] The Supreme Court has stated in this regard: "[I]t

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[47] It has been said that "[t]he oath remains an icon in the law." Note, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 MICH. L. REV. 1681, 1707 (1977) [hereinafter cited as *Sworn Testimony Requirement*]. This note provides a comprehensive discussion of the history of the oath and of some current issues relating to the sworn testimony requirement. It also considers whether such a requirement should be uncritically accepted today. *See generally* PERJURY REPORT, *supra* note 3, at 233-54; 6 J. WIGMORE, EVIDENCE §§ 1816-1830 (Chadbourn rev. 1976).

[48] United States v. Mandujano, 425 U.S. 564, 576 (1976).

[49] FED. R. EVID. 603. Rule 603 codifies the traditional "sworn testimony rule." It has been said that a witness who refuses to take an oath is "not a witness at all." United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971), *aff'd. on appeal after remand*, 467 F.2d 86 (1972), *cert. denied*, 410 U.S. 984 (1973). Many jurisdictions bar the admission in evidence of unsworn oral testimony. *See Sworn Testimony Requirement, supra* note 47, at 1682 n.8.

In order to "enhance the solemnity of the administration of oaths," a major study of perjury recommended that in addition to the oath, an admonition be added that false testimony may lead to prosecution for perjury; the posting of a similar warning "in clear legible type" near the witness stand; requiring that the witness sign a card upon which is printed the oath "and/or anything else that may be deemed valuable." PERJURY REPORT, *supra* note 3, at 323. However, the courts have emphatically rejected such supplemental warnings: "Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it." United States v. Winter, 348 F.2d 204, 210 (2d Cir. 1965), *quoted in* United States v. Mandujano, 425 U.S. 564, 581-82 (1976).

[50] United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976). Although the opinion for the Court in *Mandujano* was by a plurality, the concurring Justices agreed that "[t]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury." *Id.* 609. (Stewart, J. and Blackmun, J., concurring). "Although the Fifth Amendment guaranteed respondent the right to refuse to answer the potentially incriminating questions put to him before the grand jury, in answering falsely he took 'a course that the Fifth Amendment gave him no privilege to take.'" *Id.* 584-85 (Brennan, J. and Marshall, J., concurring).

[51] Bryson v. United States, 396 U.S. 64 (1969) (even assuming, arguendo, the unconstitutionality of a statute requiring a non-communist affidavit from union of-

cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." [52] Finally, in a series of cases beginning in 1954, the Supreme Court has permitted prosecutors to "flush out" perjury by using information acquired through illegal means.[53]

C. *The Defense of Entrapment*

Entrapment is often looked upon with the same repugnance as is perjury. Words like "lawless," "offensive," "revolting," and "reprehensible" are used to characterize the actions of law enforcement officials in luring a defendant to commit a crime.[54] However, in contrast with other claims frequently raised to invalidate a perjury indictment—insufficiency of the evidence,[55] lack of jurisdiction of the tribunal,[56] immaterality of the questions [57]—entrapment superficially appears to be a most peculiar and tenuous excuse.

ficers for the union to invoke the jurisdiction of the National Labor Relations Board, defendant's conviction for filing an affidavit falsely denying affiliation with the Communist Party was proper); United States v. Knox, 396 U.S. 77 (1969) (false statements contained in wagering tax form subsequently held invalid as infringing on the fifth amendment no bar to a conviction for filing a false affidavit).

[52] Bryson v. United States, 396 U.S. 64, 72 (1969).

[53] United States v. Havens, 100 S. Ct. 1912 (1980) (illegally seized evidence may be used to impeach credibility); Oregon v. Hass, 420 U.S. 714 (1975) (statements obtained after *Miranda* violation admissible to impeach credibility); Harris v. New York, 401 U.S. 222 (1971) (statements obtained after defective *Miranda* warnings may be used to impeach credibility); Walder v. United States, 347 U.S. 62 (1954) (illegally seized evidence may be used to impeach credibility). *But see* New Jersey v. Portash, 440 U.S. 450 (1979) (testimony given following grant of immunity may not be used to impeach credibility); Mincey v. Arizona, 437 U.S. 385 (1978) (involuntary confession may not be used to impeach credibility).

[54] Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 453-55 (1932) (Roberts, J., concurring); People v. Isaacson, 44 N.Y.2d 511, 522, 378 N.E.2d 78, 84, 406 N.Y.S. 2d 714, 720 (1978). *See, e.g.*, Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 263 (1942).

[55] Government of Canal Zone v. Thrush, 616 F.2d 188 (5th Cir. 1980); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Ruggiero, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Dippolito, 433 F.2d 1049 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); United States v. Fiorillo, 376 F.2d 180 (2d Cir. 1967).

[56] United States v. Williams, 341 U.S. 58 (1951); United States v. Phillips, 540 F.2d 319 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976); United States v. Sisack, 527 F.2d 917 (9th Cir. 1976); United States v. Macklin, 523 F.2d 193 (2d Cir. 1975); United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975); LaRocca v. United States, 337 F.2d 39 (8th Cir. 1964). *See* Annot., 36 A.L.R.3d 1038 (1971).

[57] United States v. Moore, 613 F.2d 1029, 1037-38 (D.C. Cir. 1979); United States v. Percell, 526 F.2d 189, 190 (9th Cir. 1975); United States v. Koonce,

Under the generally accepted view, the entrapment defense is available when a law enforcement official originates the idea of the crime and then induces the defendant, who was not otherwise so disposed, to commit the offense.[58] The courts recognize that law enforcement officers must employ undercover techniques and deceit in order to uncover criminal schemes that are difficult to detect.[59] Police and prosecutors, however, may go too far in their use of deception, decoys, and provocation to undercover elusive criminal activity. Thus, it is permissible for law enforcement officers to "trap . . . the unwary criminal" but not permissible to "trap . . . the unwary innocent." [60]

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485 F.2d 374, 380-82 (8th Cir. 1973); United States v. Lococo, 450 F.2d 1196, 1198-99 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972); United States v. Winter, 348 F.2d 204, 211 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

[58] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 369-74 (1972); R. PERKINS, *supra* note 3, at 1031-36. This is the rule in the federal courts, as defined in the four major entrapment decisions of the Supreme Court. *See* Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). It is also the rule in all but seven state jurisdictions. *See* People v. Barraza, 23 Cal. 3d 675, 689, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467 (1979) (listing the jurisdictions that have rejected the federal rule); Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 166-69 (1976) (same).

[59] In this connection, the Supreme Court has commented:

> In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation . . . .

United States v. Russell, 411 U.S. 423, 432 (1973).

By the same token, corruption-related offenses such as bribery also logically lend themselves to undercover law enforcement techniques. *See* United States v. Archer, 486 F.2d 670 (2d Cir. 1973); United States v. DeSapio, 435 F.2d 272, 281-82 (2d Cir. 1970), *cert. denied*, 409 U.S. 999 (1971). The much publicized "ABSCAM" case, in which federal agents apparently posed as Arab businessmen and allegedly paid bribes to public officials, graphically illustrates the use of creative undercover methods to investigate corruption. *See, e.g.*, N.Y. Times, Feb. 3, 1980, at A1, col. 1. *See generally* HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, IN THE MATTER OF REPRESENTATIVE MICHAEL J. MYERS, H.R. REP. No. 1387, 96th Cong., 2d Sess. (2 vols.) (1980).

[60] Sherman v. United States, 356 U.S. 369, 372 (1958); Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J. dissenting). It has been suggested that the term "entrapment" is a misnomer because "[i]t is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated." People v. Braddock, 41 Cal. 2d 794, 802, 264 P.2d 521, 525 (1953); R. PERKINS, *supra* note 3, at 1031.

Needless to say, attempts to differentiate between an "unwary criminal" and an "unwary innocent" lead to confusion. In both cases, "[the defendant's] conduct includes all the elements necessary to constitute criminality" and "is not less criminal because of the result of temptation." Sherman v. United States, 356 U.S. 369,

The entrapment defense has been the source of considerable confusion and controversy,[61] but one can isolate three distinct doctrinal positions. The central issue has always been whether the focus of the defense should be on the character of the victim of the trap—a subjective test—or, alternatively, on the methods used by the government to lure the victim into the commission of crime—an objective test.[62] Apart from the subjective and objective approaches, some courts have applied due process doctrines in connection with the entrapment defense.[63]

The Supreme Court, although sharply divided over the proper formulation of the entrapment defense,[64] has consistently embraced the subjective position. The majority views the test to be "whether the defendant *is a person otherwise innocent* whom the Govern-

379-80 (1958) (Frankfurter, J., concurring). *See also* Mikell, *supra* note 54, at 245, 252-56. Moreover, such a dichotomy has serious evidentiary consequences for a defendant who seeks to avail himself of the defense. For if the defense is raised, the courts permit the introduction of rebuttal evidence to prove the defendant's prior criminal history in order to negate a claim of "unwary innocence." Sherman v. United States, 356 U.S. at 382 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 441, 451-52 (1932). The prejudice inherent in such a situation is obvious.

[61] Sherman v. United States, 356 U.S. 369, 378 (1978) (Frankfurter, J., concurring) (characterizing entrapment decisions as "gropingly . . . express[ing] the feeling of outrage at conduct of law enforcers . . . but without the formulated basis in reason that . . . is the first duty of courts to construct"); Mikell, *supra* note 54, at 263 ("there seems to be no rational basis for the doctrine"); Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 943 (1965) (characterizing the entrapment defense as "a failure").

The law of entrapment has inspired an immense body of scholarly literature. See Park, *supra* note 58, at 167 n.13, in which the author catalogues the numerous commentaries on the topic.

[62] The subjective-objective dichotomy is used to refer to the two formulations of the entrapment defense. *See* Hampton v. United States, 425 U.S. 484, 496-97 (1976) (Brennan, J., dissenting); United States v. Russell, 411 U.S. 423, 440-41 (1973) (Stewart, J., dissenting). Various other labels have been used to characterize the two formulations. The subjective test has been called the "federal defense," the "genesis of the criminal design" formula and the "origin of the criminal intent" formula; the objective test has been referred to as the "hypothetical-person" defense and the "police conduct" test. *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pidgeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1102 (1951); Park, *supra* note 58, at 165-66.

[63] United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Jannotti, No. 80-166 (E.D. Pa. Nov. 26, 1980); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (1980). *See generally* Note, *Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655 (1974); Note, *Defense of Entrapment: Next Move—Due Process?*, 1971 UTAH L. REV. 266.

[64] Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

ment is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." [65] Applying this test in *Sorrells v. United States* [66] and *Sherman v. United States,*[67] the Supreme Court held that the entrapment defense should have been available. The cases are factually indistinguishable. Federal undercover agents gained the confidence of the defendants and repeatedly importuned them to provide the agents with illegal substances. In *Sorrells,* the agent posed as a tourist sharing war experiences with the defendant. In *Sherman,* the agent posed as a narcotics addict in desperate need of drugs. Despite initial refusals, the defendants finally capitulated and were prosecuted and convicted. In both cases, a majority of the Court adopted the subjective test: "[W]hen the criminal design originates with the officials of the Government, and they *implant in the mind of an innocent person the disposition* to commit the alleged offense and induce its commission in order that they may prosecute," the entrapment defense may be raised.[68]

In two later decisions, again applying the subjective test, the Supreme Court ruled that the entrapment defense could not be raised. In *United States v. Russell,*[69] a government agent supplied the defendant with "an essential ingredient" in the manufacture of narcotics.[70] In *Hampton v. United States,*[71] an undercover agent

[65] Sorrells v. United States, 287 U.S. 435, 451 (1932) (emphasis added). *See* Hampton v. United States, 425 U.S. 484, 488-89 (1976); United States v. Russell, 411 U.S. 423, 428-29 (1973); Sherman v. United States, 356 U.S. 369, 372 (1958).

[66] 287 U.S. 435 (1932).

[67] 356 U.S. 369 (1958).

[68] Sherman v. United States, 356 U.S. at 372 (emphasis added) (quoting Sorrells v. United States, 287 U.S. at 442). In *Sorrells* and *Sherman,* the majority predicated the entrapment defense upon the theory that in enacting the criminal statutes in question, Congress could not have intended "that [the] processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to [commit the crimes] and to punish them." Sorrells v. United States, 287 U.S. at 448; *accord,* Sherman v. United States, 356 U.S. at 372.

The majority's use of statutory construction to justify the defense of entrapment has been criticized by other members of the Court as "strained and unwarranted rationalizing," Sorrells v. United States, 287 U.S. at 455-56 (Roberts, J., concurring) and "sheer fiction," Sherman v. United States, 356 U.S. at 379 (Frankfurter, J., concurring). The critics argue that the only legislative intent disclosed by the statute is in the several elements necessary for conviction; that if the defendant's conduct includes all of those elements—as it did in *Sorrells* and *Sherman*—he should be relieved from punitive consequences not because he is innocent of the offense, but, rather, because of the public policy "against enforcement of the law by lawless means." Sherman v. United States, 356 U.S. at 380 (Frankfurter, J., concurring).

[69] 411 U.S. 423 (1973).

[70] *Id.* 447 (Stewart, J., dissenting).

[71] 425 U.S. 484 (1976).

supplied the defendant with illegal narcotics—the *"corpus delicti"* [72] —which the defendant then sold to another government agent. In both cases, however, the defendants' conceded predisposition to commit narcotics crimes [73] rendered unavailable the defense of entrapment.

Under the subjective formulation, therefore, the Court often confines its inquiry to the defendant's character and excludes from consideration the government's overt behavior. By contrast, the objective test focuses not on the defendant's innocence, predisposition, or criminal propensity, but rather on the acts of law enforcement officials that "create a crime and then punish the criminal, its creature." [74] In the words of Justice Frankfurter, "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power." [75]

In addition to the majority's subjective and Frankfurter's objective entrapment formulations, due process doctrines have sometimes been invoked as a basis for entrapment. Although entrap-

[72] *Id.* 489.

[73] Hampton v. United States, 425 U.S. at 489-90; United States v. Russell, 411 U.S. at 433.

[74] Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting), *quoted in* United States v. Russell, 411 U.S. 423, 437 (1973) (Douglas, J., dissenting).

The objective test has been adopted by the Model Penal Code and the proposed new federal criminal code. *See* MODEL PENAL CODE § 2.13 (Prop. Off. Draft, 1962); U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971). Commentators on the subject have overwhelmingly favored the objective test. *See* W. LAFAVE & A. SCOTT, *supra* note 58, at 371-73; authorities cited in Park, *supra* note 58, at 167 n.13.

[75] Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring). Concurring in Sorrells v. United States, 287 U.S. 430, 459 (1932), Justice Roberts stated:

> The applicable principle is that the courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

Directly related to the substantive issue whether entrapment should be subjectively or objectively based is the procedural issue whether the defense is one of fact for the jury or law for the court. The rule, generally, is that a subjective test focusing on the defendant's predisposition raises a question of fact for the jury, whereby the defendant must affirmatively prove that he was not predisposed. Sherman v. United States, 356 U.S. at 377; Sorrells v. United States, 287 U.S. at 452. *See also* N.Y. PENAL LAW § 40.05 (McKinney 1975). However, if entrapment is aimed at deterring impermissible government actions—an objective approach—then it is viewed as a bar to prosecution and appropriate for the court's determination. Sherman v. United States, 356 U.S. at 385 (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. at 457 (Roberts, J., concurring).

ment is not a defense of constitutional magnitude,[76] the Supreme Court has suggested that when undercover methods are sufficiently outrageous, principles of due process could be invoked to bar prosecution regardless of the defendant's predisposition.[77] Thus, even in jurisdictions that apply the subjective test for entrapment, due process is nevertheless available as a defense to sufficiently outrageous governmental conduct.[78]

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[76] United States v. Russell, 411 U.S. 423, 433 (1973). The Supreme Court noted in *Russell* that because the defense was "not of a constitutional dimension," Congress could broaden the substantive definition if it chose to. *Id.* The proposed new federal criminal code would do just that. *See* note 74 *supra.*

[77] Citing Rochin v. California, 342 U.S. 165 (1952), the well-known stomach pumping case, the Court in *Russell* stated: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." 411 U.S. at 431-32. In light of this statement, it is surprising that three years later, three justices would write: "[in *Russell*] [w]e ruled out the possibility that the defense of entrapment could *ever* be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." Hampton v. United States, 425 U.S. 484, 488-89 (1976) (opinion of Rehnquist, J., joined by Burger, C.J., and White, J.) (emphasis added). However, the concurring (Powell, J. and Blackmun, J.) and dissenting (Brennan, J., Stewart, J., and Marshall, J.) opinions in *Hampton* (Mr. Justice Stevens took no part in the consideration or decision of the case) suggest that a due process defense is available to a predisposed defendant who has been entrapped by flagrant governmental conduct. *Id.* 495, 497. For cases involving an application of a due process defense, see note 63 *supra.*

In two cases, the Supreme Court invoked the due process variation of entrapment to reverse convictions. Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959). In *Cox,* the defendants were convicted of unlawfully picketing near a courthouse in violation of a Louisiana statute. Uncontradicted testimony showed that the local chief of police gave the demonstrators permission to march where they did and assured them that such a demonstration would not be one "near" the courthouse within the terms of the statute.

In *Raley,* the defendants were convicted of contempt following their refusal to answer questions before the Ohio "Un-American Activities Commission" investigating alleged subversive activities. The defendants were informed by the Commission that they had the right to rely on the privilege against self-incrimination. Despite such assurances, the defendant's contempt convictions were affirmed by the Ohio Supreme Court on the ground that a state immunity statute deprived them of the privilege.

The Supreme Court found in both cases that to sustain the convictions "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had told him was available to him." Cox v. Louisiana, 379 U.S. at 570; Raley v. Ohio, 360 U.S. at 438.

Although *Sorrells* was cited in *Raley* as indirect doctrinal authority, Raley v. Ohio, 360 U.S. at 438, *quaere* whether the Supreme Court is correctly invoking entrapment doctrine as distinguished from principles of estoppel. *See* Note, *Applying Estoppel Principles in Criminal Cases,* 78 YALE L.J. 1046 (1969).

[78] *See* People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978), in which the New York Court of Appeals invoked due process standards to reverse a narcotics conviction of a defendant predisposed to commit the crime. The court found that the government's brutalization and deception of an informant in order to have him lure the defendant into New York to sell him drugs was "repugnant," "lawless," and "ugly" and "revealed a brazen and continuing pattern in dis-

When applied to perjury, the entrapment defense encounters difficulty. Conceptually, there are obvious problems in applying the majority's subjective test for entrapment to the perjury offense. First, it is highly unrealistic to view perjury as the kind of crime to which undercover techniques of law enforcement are directed. It is difficult to imagine law enforcement officials baiting witnesses into the commission of perjury by repeated entreaties or temptations. To be sure, it is the prosecutor's questions that elicit the false responses, but it is a giant leap from that premise to a conclusion that the prosecutor "implanted in the mind of an [honest witness] the disposition to [lie]."

Second, it is incongruous, except in the most hypothetical cases, to speak of a predisposition to commit perjury. In inferring a predisposition to commit a substantive crime—for example, racketeering or extortion—judicial inquiry may focus upon the defendant's resistance to undercover agents' entreaties or pressures, his criminal record, or his reputation. In contrast, determining whether a defendant was predisposed to commit perjury raises what is probably an unanswerable question: Is the defendant a truth-teller or a lie-teller? Indeed, the notion of a predisposition to commit perjury has little meaning except in the sense that a person is an habitual liar. In sum, perjury is not the type of crime to which the subjective test for entrapment can meaningfully be applied.

Although it makes no sense to inquire into a defendant's predisposition to perjure himself, it does not follow that the entrapment defense has no bearing upon a perjury charge. An approach to entrapment focusing on the unfairness of the government's conduct—either the objective test or the due process test—clearly would be relevant in the context of perjury. Instead of looking at the witness's predisposition to lie, the inquiry would center on the prosecutor's premeditated design to trap the witness into perjury. The task of proving deliberate prosecutorial conduct of this kind is extremely difficult.[79] But if such law enforcement conduct is unfair, an objective or due process test for entrapment may provide the basis for a meaningful and viable defense to perjury.

regard of fundamental rights." 44 N.Y.2d at 522-23, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.

One frequently cited article on the subject recommends that to abate the practice of entrapment, the state—without excusing the defendant—should prosecute the offending official either for criminal solicitation or as an accomplice. *See* Mikell, *supra* note 54, at 264. In this connection, see N.Y. PENAL LAW § 35.05(1) (McKinney 1975) ("conduct which would otherwise constitute an offense is justifiable and not criminal when . . . performed by a public servant in the reasonable exercise of his official powers, duties or functions").

[79] *See* text accompanying notes 140-87 *infra*.

The courts have already implicitly acknowledged that it is unfair, and hence impermissible, for a prosecutor to summon and question a witness before a grand jury *solely* for the purpose of procuring perjured testimony.[80] It is difficult to take issue with this proposition. The purpose of a grand jury investigation is to ferret out crime. In the words of the Supreme Court, the prosecutor's questions are "for the purpose of bringing out the truth of the matter under inquiry." [81] As noted earlier, the perjury offense is designed to safeguard the integrity of this truth-seeking process. If, under the guise of an otherwise legitimate investigation, a prosecutor solicits testimony with the premeditated design of indicting the witness for perjury, the grand jury is put to an unintended and inappropriate use. The extraordinary powers of the grand jury [82] are focused on a single witness in an effort to draw perjurious testimony from him. The narrowly circumscribed rights of witnesses before a grand jury and the secrecy of the ex parte proceedings contribute to the unfairness of the situation. The relative helplessness of the witness caught in a perjury trap aside, there appears to be no legitimate governmental interest in such harsh treatment.[83]

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[80] *See* cases cited in note 15 *supra.*

[81] Blair v. United States, 250 U.S. 273, 282 (1919).

See also United States v. Lardieri, 497 F.2d 317 (3d Cir. 1974), in which the defendant, convicted of perjury pursuant to 18 U.S.C. § 1623 (1970) (current version at 18 U.S.C. § 1623 (1976 & Supp. III 1979)), advanced several claims of error. The Third Circuit disposed of these issues rather quickly, and then addressed an issue that had not been briefed or raised below. The court observed that "the reason for having a witness testify before a grand jury is to discover the truth, not to lay the groundwork for a perjury conviction." 497 F.2d at 320. It then remanded the case for a hearing on the propriety of the prosecutor's actions before the grand jury. The court was particularly troubled by the possibility that the prosecutor had misled the defendant on the subject of his right to recant under § 1623(d). *Id.* 321. Although the defendant's conviction was ultimately sustained, United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974), the case illustrates the uneasiness that deliberate attempts to procure perjury have generated in the courts. *See* cases cited in note 15 *supra.*

[82] *See* notes 16-38 *supra* & accompanying text.

[83] Courts have frequently looked to the societal or governmental need for particular types of police trickery or deceit in judging the fairness of law enforcement techniques. Thus, Justice Powell, concurring in *Hampton*, reasoned that the finding of a due process violation because of police over-involvement in a crime "would be especially difficult to show with respect to contraband offenses, *which are so difficult to detect in the absence of undercover Government involvement.*" 425 U.S. at 431-32 (emphasis added). *See* United States v. Twigg, 588 F.2d 373, 377 n.6 (3d Cir. 1978) (in evaluating fairness "the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it"); United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975) (condemning police activity lacking "no justifying social objective").

The prevention of perjury does not require the use of law enforcement trickery and deceit. Such tactics are most necessary in preventing covert, consensual crimes, such as organized crime or loansharking, which often involve a fairly complex underground organization. Plainly, perjury is not this type of crime. Perjury of-

As noted above, the grand jury investigation has the purpose of "bringing out the truth of the matter under inquiry." Plainly, if a prosecutor knows the truth and questions a witness solely in order to elicit and preserve falsehoods, the truth-seeking process is not furthered. Indeed, by refusing, for example, to probe the witness's responses, the prosecutor may actually frustrate the search for truth.[84] In short, the perjury trap is both unfair to its victims and contrary to the purposes of grand jury investigation.

II. An Example: Trap-Setting or Honest Investigation?

At this point, an example might be helpful.[85] Assume that during an investigation into political corruption, government investigators using a court-ordered wiretap [86] secretly overhear a tele-

fenses can be adequately dealt with by orthodox law enforcement techniques: if a prosecutor suspects that testimony may have been perjurious, he may seek evidence to support his suspicion. In short, the justifications for law enforcement trickery in other contexts are inapplicable to perjury. This conclusion, as the cases noted above suggest, weighs heavily against claims that the perjury trap is fair.

[84] *See* notes 228-29 *infra* & accompanying text.

[85] The example, although fictitious, is improvised from actual cases with which the author has had some contact.

[86] Electronic surveillance techniques such as wiretapping and bugging, which are conducted without the consent of the parties and which involve the secret installation of mechanical devices at specific locations to receive and transmit conversation, are generally felt by law enforcement officials to be indispensable to effective investigation and prosecution of white collar and organized crime. *See* C. Fishman, Wiretapping and Eavesdropping 3 (1978); President's Report, *supra* note 4, at 201-03. Federal law and the laws of 25 states permit court-ordered electronic surveillance in varying circumstances when the parties to the conversation have not consented to it. *See, e.g.*, 18 U.S.C. § 2516 (1976); N.J. Stat. Ann. § 2A: 156A-8 (West 1971); N.Y. Crim. Proc. Law § 700.10 (McKinney 1971).

Equally indispensable to law enforcement is electronic surveillance techniques in which one of the parties to the conversation consents to have the conversation recorded. *See* United States v. White, 401 U.S. 745 (1971) (plurality opinion); Osborn v. United States, 385 U.S. 323 (1966); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Dowdy, 479 F.2d 213 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973).

Most pertinent to this Article, however, is the utility of the recorded conversations to a prosecutor in his examination of the witness in the grand jury, particularly when a perjury charge is contemplated. Assuming a prosecutor possesses an electronic recording of what the witness has said on a previous occasion—inherently "accurate and reliable," United States v. White, 401 U.S. 745, 753 (1971) (plurality opinion)—the prosecutor has the evidentiary basis upon which to prepare a perjury charge should the witness testify inconsistently with his recorded statements. *See* United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2922 (1980); United States v. Beitling, 545 F.2d 1106 (8th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977); United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978); People v. Schenkman, 46 N.Y.2d 232, 385 N.E.2d 1214, 413 N.Y.S.2d 284 (1978); People v. Lee, 34 N.Y.2d 884, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974).

phone conversation between a person named White, leader of a local political party, and an acquaintance of his named Singer, a real estate developer under scrutiny by the district attorney's office in connection with alleged pay-offs to housing inspectors. A transcript of a portion of the ten-minute telephone conversation follows:

WHITE: Get to the point.

SINGER: Let me ask you this. The D.A. says I gave money to building people. I'm being looked at very closely.

WHITE: Who's talking?

SINGER: I don't know. That's one of the things I wanted to ask you. Who it is and whether this thing can be worked out. You don't know what it's doing to me.

WHITE: Do you have a lawyer?

SINGER: I haven't talked to one yet.

WHITE: Well, you should get a lawyer who knows his way around, I mean a lawyer who can talk to these people.

SINGER: Knows which people?

WHITE: A lawyer who can straighten things out, who knows the D.A. Why don't you talk to my brother Al. He's been there before. He knows how to handle these things. Talk to him. He may be able to help you. If anybody can quash it with the D.A., he can.

Four months later, White was subpoenaed to appear before a grand jury. Prior to his appearance, and represented by counsel, White was informally advised by the prosecutor that the grand jury was conducting an investigation into official corruption, including the crimes of bribery, conspiracy, and official misconduct, and that it desired to question White in that regard.[87] White was advised

[87] It is not uncommon for an attorney representing a witness who has been subpoenaed to testify before a grand jury to arrange a conference with the prosecutor in charge of the investigation. The attorney will seek information as to the general subject matter of the grand jury's inquiry, whether his client is a "target" of the investigation, and whether the grand jury will confer immunity upon his client. *See* ABA ANTITRUST SECTION, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS 61 (1978); NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES 17, 28 (2d rev. ed. 1979); Smaltz, *Tactical Considerations for Effective Representation During A Government Investigation*, 16 AM. CRIM. L. REV. 383, 388-403 (1979).

by the prosecutor [88] that he was not a target of the investigation,[89] that he could refuse to answer any questions by invoking his fifth amendment privilege,[90] and that in the event he chose to invoke the privilege, the grand jury would compel his testimony by conferring transactional immunity upon him.[91] White's attorney stated

[88] Although the Supreme Court has held that a prosecutor need not advise a grand jury witness of his status, or of the availability of constitutional protection, many prosecutors' offices routinely advise witnesses of the subject matter of the investigation, that they are targets of the investigation, that they have a privilege against self-incrimination, that their testimony may be used against them, and that they may have a reasonable opportunity to step outside the grand jury room to consult with counsel. United States v. Jacobs, 531 F.2d 87, 89-90 (2d Cir. 1976); M. FRANKEL & G. NAFTALIS, *supra* note 18, at 62; UNITED STATES ATTORNEYS' MANUAL—CRIMINAL DIVISION § 9-11.250 (1978).

[89] A "target" of a grand jury investigation is a person linked by substantial evidence to the commission of a crime who, in the judgment of the prosecutor, is a putative defendant. A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. UNITED STATES ATTORNEYS' MANUAL, *supra* note 88. The Supreme Court has consistently held that there is no constitutional impropriety in summoning prospective defendants—targets—to testify before a grand jury. United States v. Wong, 431 U.S. 174, 179 n.8 (1977); United States v. Mandujano, 425 U.S. 564, 584 n.9 (1976); United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973). *See* note 9 *supra*. For "the very purpose of the inquiry is to ferret out criminal conduct, and sometimes potentially guilty persons are prime sources of information." United States v. Wong, 431 U.S. at 179-80 n.8.

Although White may have been a subject of the investigation, it does not appear from the information in the possession of the prosecutors that White was a potential defendant, however sinister his suggestions may have sounded. The prosecutor was not being deceptive in representing that White was not considered a target of the investigation.

[90] The most important exemption from the duty to testify is the fifth amendment privilege against compulsory self-incrimination. Kastigar v. United States, 406 U.S. 441, 444 (1972). For the history and role of the fifth amendment privilege, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE §§ 2250-51 (McNaughton rev. 1961); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). *See also* DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) (Wisdom, J.).

[91] Immunity statutes represent an accommodation between the government's power to compel testimony and the witness's privilege against compulsory self-incrimination. Wigmore referred to such statutes as "expedients resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable because of the implication in the offense itself of all who could bear useful testimony." 8 J. WIGMORE, EVIDENCE § 2281 at 492 (McNaughton rev. 1961). *See generally* Murphy v. Waterfront Comm'n, 378 U.S. 52, 92-93 (1964) (White, J., concurring).

Immunity statutes "have historical roots deep in Anglo-American jurisprudence" and are presently in effect in every jurisdiction in America. Kastigar v. United States, 406 U.S. 441, 445-47 (1972). *See, e.g.*, 18 U.S.C. § 6002 (1976) (general federal immunity statute); N.Y. CRIM. PROC. LAW § 50.20 (McKinney 1971). They have been characterized by the Supreme Court as essential to effective law enforcement and, indeed, a "part of our constitutional fabric." Kastigar v. United States, 406 U.S. at 447; Ullmann v. United States, 350 U.S. 422, 438 (1956) (Frankfurter, J.).

A grant of immunity is the quid pro quo to compel the witness to answer, even though the answers would implicate the witness in criminal activity. United States v. Mandujano, 425 U.S. 564, 575 (1976). "Immunity displaces the danger." Ullmann v. United States, 350 U.S. at 439. See SENATE REPORT, *supra* note

that White would cooperate fully with the grand jury but would request immunity. The prosecutor agreed.

After taking the oath, White was questioned by the prosecutor. Following preliminary background questions, White was asked whether he had ever intervened on anyone's behalf to influence official actions in a legal proceeding.[92] White stoutly denied that

10, at 55, which recommended the passage of a general federal immunity statute more restrictive than its predecessors.

One of the major constitutional issues in this area has been the scope of the immunity conferred, and whether it effectively "displaces the danger" of self-incrimination. There are three options open to a prosecutor with respect to a witness's testimony: first, *use* of the testimony against the witness in a later proceeding; second, use of information *derived from* that testimony against the witness in a later proceeding; third, prosecution of the witness based on the *transaction* about which he gave evidence. The question whether an immunity statute must protect against the use, the derivative use, or prosecution for the transaction itself has caused difficulty. Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892). Suffice that to pass constitutional muster, an immunity statute only need confer immunity from use of the testimony or the evidence derived from it, and need not extend so as to immunize against prosecution for the transaction itself. Kastigar v. United States, 406 U.S. 441 (1972). *Compare* 18 U.S.C. § 6002 (1976) (providing use and derivative-use immunity) *with* N.Y. CRIM. PROC. LAW § 50.10 (McKinney 1971) (providing transactional immunity). If a defendant who testifies under a grant of use and derivative-use immunity is subsequently prosecuted, the government has the burden of showing that the evidence it seeks to use is derived from a source totally independent of the compelled testimony. Kastigar v. United States, 406 U.S. at 460; Murphy v. Waterfront Comm'n, 378 U.S. at 79 n.18. Placing such an affirmative duty on the government offers the defendant "very substantial protection." Kastigar v. United States, 406 U.S. at 461.

It is also settled that immunity statutes are a quid pro quo for truthful testimony. False testimony given under a grant of immunity is explicitly excepted from the grant and is subject to prosecution for perjury. *See* United States v. Apfelbaum, 445 U.S. 115 (1980); Glickstein v. United States, 222 U.S. 139 (1911); 18 U.S.C. § 6002 (1976); N.Y. CRIM. PROC. LAW § 50.10(1) (McKinney 1971).

Finally, it should be noted that a prosecutor's ability to set a perjury trap often may be dependent upon his ability to immunize his target. Some jurisdictions, however, place significant restrictions upon a prosecutor's ability to obtain a grant of immunity for a witness. Frequently, the prosecutor is required to appear before a judicial officer and make a showing of materiality, *e.g.*, NEV. REV. STAT. § 178.572 (1973) (court may grant immunity to "any material witness"), or propriety, *e.g.*, MICH. COMP. LAWS ANN. § 767.19a (1980 Supp.) (judge may grant prosecuting attorney's application for immunity for a witness if "in the interest of justice"), before a witness will be immunized. In some jurisdictions, the procedures are rather onerous, *e.g.*, MASS. ANN. LAWS ch. 233, § 20E (Law. Co-op. 1974), while in others, grants are automatic, *e.g.*, KAN. STAT. ANN. § 22-3102 (1974); VT. STAT. ANN. tit. 13, § 3436 (1974). In some instances, prosecutors face administrative obstacles, such as requirements that a prosecutor notify or obtain the approval of a superior before seeking a grant of immunity, *e.g.*, MASS. ANN. LAWS ch. 233, § 20E (Law. Co-op. 1974); N.C. GEN. STAT. § 15A-1053 (Michie 1978). These judicial and administrative restrictions on a prosecutor's ability to immunize witnesses may provide an indirect safeguard against the use of the perjury trap. It is unlikely, however, that these restrictions will be applied with either sufficient scrutiny or consistency to provide adequate safeguards against the use of perjury traps.

[92] Inherent in this type of question are highly ambiguous terms such as "intervened" and "influence," which raise issues pertinent to the perjury trap. *See*

he had ever done so. White then was asked whether he knew a person named Singer, and whether he had talked to him recently. White said he had. The prosecutor then engaged White in the following interrogation:

Q. You say that Singer asked you for advice?
A. Yes, he asked me for advice on a legal matter and I told him I couldn't give him any advice.
Q. Did he tell you what kind of legal matter it was?
A. No.
Q. Did he ask you anything else?
A. He asked me if there was anything I could do for him.
Q. What did you tell him?
A. I told him that I could not give him legal advice; that if he wanted legal advice he should go to see a lawyer.
Q. Did he say anything else?
A. He asked me if I knew any lawyers. I told him my brother was a lawyer and that if he needed legal advice he could speak to my brother. That's as far as I can recall the conversation. It lasted only a few minutes.
Q. Did you tell Singer that he should get a lawyer who could influence the D.A.?
A. I did not.
Q. Did you tell Singer that he should get a lawyer who could fix things with the D.A.?
A. Absolutely not.
Q. Did you tell Singer that your brother could quash things with the D.A.?
A. No.

On the basis of this testimony, the grand jury indicted White on three counts of perjury for his denials in response to the last three questions. The evidence against White was the authenticated tape recording of his telephone conversation with Singer previously introduced in evidence before the grand jury.[93]

note 257 *infra* & accompanying text. Thus, a prosecutor bent on trapping a witness into giving answers subject to contradiction might employ vague, ambiguous, or uncertain terms that the witness might truthfully understand to have one meaning but that others could understand differently. *See* United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967) (question upon which perjury charge was based was susceptible of two different interpretations); O'Connor v. United States, 240 F.2d 404, 405 (D.C. Cir. 1956) (use of phrase "the Communist conspiracy" is "so vague that the witness is unable to answer with knowledge of its meaning"); United States v. Lattimore, 215 F.2d 847, 849 (D.C. Cir. 1954) ("[t]he word 'sympathizer' is not of sufficiently certain meaning to sustain a charge of perjury"). *See also* Bronston v. United States, 409 U.S. 352, 358, 360 (1973).

[93] Assuming a proper foundation is laid by government witnesses to establish that the tape recording is the actual and true recording of the White-Singer conversation, and that the voices are those of White and Singer, the tape would con-

For purposes of this discussion, several points should be noted. For one thing, a perjury indictment sounding in corruption against a major political figure would be a newsworthy event, one particularly tantalizing to an ambitious prosecutor who covets a public image as an aggressive crime fighter.[94] There was, after all, insufficient evidence to charge White with any substantive offense and, from the prosecutor's perspective, little chance of connecting him with crimes of bribery or official corruption.[95] This is implicit in the prosecutor's decision to immunize White, thereby forfeiting any chance of prosecuting him for a substantive crime relating to the subject matter of his testimony.[96]

By immunizing White, the prosecutor in effect represented that he sought the witness's truthful testimony primarily to further the investigation. The prosecutor's questions, however, were not directed to the witness's knowledge of antecedent crime or misconduct. Rather, his questions—largely tracking a transcript of the recording—related to whether the witness had said something that

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stitute sufficient evidence to prove false White's testimony. *See, e.g.*, People v. Lee, 34 N.Y.2d 884, 316 N.E.2d 715, 359 N.Y.S.2d 280 (1974). *See also* C. FISHMAN, *supra* note 86, at 324 n.12, 470-71.

[94] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (massive publicity of murder trial held two weeks before general election at which chief prosecutor a candidate for a judgeship). The American Bar Association has implicitly recognized that some prosecutors use the media to exploit their office and gain favor with the public. *See* ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 1.3(a) (1974) ("The prosecutor should not exploit his office by means of personal publicity connected with a case before trial, during trial and thereafter.").

Interestingly, the New York perjury cases against several prominent individuals, *see* notes 12-14 *supra* & accompanying text, later dismissed as traps, received considerable "front-page" acclaim by the media when the indictments were first announced. For newspaper reports on *People v. Tyler*, see N.Y. Times, Nov. 5, 1976, at A1, col. 2 ("Two Juries Indict a New York Judge"); N.Y.L.J., Nov. 5, 1976, at 1, col. 3 ("2 Indictments Accuse Judge of Perjury, Official Misconduct"). For reports on *People v. Brust*, see N.Y. Times, Feb. 25, 1976, § 1, at 1, col. 3 ("Ex-State Justice Charged with Lying to Grand Jury"); N.Y.L.J., Feb. 25, 1976, at 1, col. 2 ("Perjury Counts Filed Against Former Judge"). For reports on *People v. Monaghan*, see N.Y. Times, March 21, 1974, § 1, at 1, col. 6 ("Ex-City Police Head is Facing Indictment"); N.Y. Times, March 22, 1974, § 2, at 43, col. 5 ("Monaghan, Ex-Police Commissioner, is Cited for Perjury in Loan-Sharking"). For reports on *People v. Rao*, see N.Y. Times, May 15, 1974, § 1, at 1, col. 8 ("A Customs Judge and Son Accused of Lying to Jury—Nadjari Cites Paul Rao, Sr. and Jr. in Connection with Inquiry on Bribery Plan—Law Partner Is Named"); N.Y.L.J., May 15, 1974, at 1, col. 4 ("Judge Rao and Son Indicted for Perjury by Nadjari Jury"). For report on *People v. Blumenthal*, see N.Y. Times, Dec. 6, 1975, § 1, at 1, col. 6 ("Blumenthal Calls Charge 'Outrageous, Unfounded'").

[95] I assume that the tape recording is the only evidence remotely suggesting arguably corrupt conduct by White, and that further investigation revealed no additional information linking White to misconduct. Needless to say, the recording alone, even if it could be construed as some sort of criminal solicitation, fails to sufficiently demonstrate a mens rea usually necessary to charge a crime. *See* Morissette v. United States, 342 U.S. 246 (1952).

[96] *See* note 91 *supra*.

the prosecutor and the grand jury already secretly knew the witness had said. There is no indication that truthful answers to these questions would materially have advanced the grand jury's inquiry.[97] Moreover, even assuming that the questions were put to White in good faith, it is strange that no effort was made to stimulate White's recollection.[98] The whole tenor of the question-

[97] "Materiality" is one of the most troublesome elements in the law of perjury. PERJURY REPORT, *supra* note 3, at 238. At common law and under nearly all current statutes, materiality is a required element of perjury. 4 W. BLACKSTONE, COMMENTARIES * 137 (false statement "must be in some point material to the question in dispute" and not "be in some trifling circumstance to which no regard is paid"); MODEL PENAL CODE § 208.20 (Tent. Draft No. 6, 1957). *See* note 3 & statutes cited therein. *See also* Annot., 22 A.L.R. FED. 379 (1975). The theory is that false testimony to unimportant or irrelevant questions will not usually impede government, nor does such testimony indicate antisocial propensities of the declarant. *See* United States v. Lattimore, 215 F.2d 847, 867-68 (D.C. Cir. 1954) (Edgerton, J., concurring); MODEL PENAL CODE § 208.20 (Tent. Draft No. 6, 1957). The test of materiality has been variously described as any false testimony that would have a "natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation," United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970), or is "capable of influencing the tribunal on the issue before it," Blackmon v. United States, 108 F.2d 572, 573 (5th Cir. 1940). Some courts, however, do not require that the false testimony be pertinent to the investigation but only "important in some substantial degree." United States v. Lattimore, 215 F.2d 847, 866-67 (D.C. Cir. 1954) (Edgerton, J., concurring). It is not necessary to establish that the false testimony actually impeded the grand jury investigation. United States v. Percell, 526 F.2d 189, 190 (9th Cir. 1975); United States v. Tyrone, 451 F.2d 16, 18 (9th Cir. 1971) ("The only requirement is that the question be material to the subject of the grand jury inquiry."). Whatever the test employed, deciding whether false testimony is material has proved difficult. *See* MODEL PENAL CODE § 208.20 (Tent. Draft No. 6, 1957); PERJURY REPORT, *supra* note 3, at 269-84.

The federal courts and most state courts view materiality as a question of law. *See* Sinclair v. United States, 279 U.S. 263, 298 (1929); Annot., 62 A.L.R. 2d 1027 (1958). *But see* People v. Ianniello, 36 N.Y.2d 137, 144, 325 N.E.2d 146, 149, 365 N.Y.S.2d 821, 826 (1975) (materiality is a question of fact). In jurisdictions construing materiality as a question of fact, the courts permit the introduction of collateral evidence of the crimes under investigation by the grand jury—evidence that may seriously prejudice the defendant—in order to demonstrate that the questions were pertinent. *See, e.g.*, People v. Stanard, 32 N.Y.2d 143, 297 N.E.2d 77, 344 N.Y.S.2d 331 (1973).

[98] One of the major issues in connection with the perjury trap is whether and to what extent a prosecutor must seek to refresh the recollection of the witness who gives testimony that the prosecutor knows can be contradicted. Of course, at trial, the cross-examiner must lay a foundation—ask the witness whether he made the supposed contradictory statement—before impeaching a witness by a prior inconsistent statement. 3A J. WIGMORE, EVIDENCE § 1025 (Chadbourn rev. 1970); FED. R. EVID. 613(b).

The Supreme Court has stated:

> It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

Bronston v. United States, 409 U.S. 352, 358-59 (1973).

The courts seem to be in agreement that there is no requirement that the prosecutor in the grand jury stimulate the recollection of the witness or inform

ing could be viewed as playing upon the ambiguity of language and the hazy memory of the witness as against the clarity of the prosecutor's meaning to the grand jurors and their immediate recall of the recorded conversation.

From the prosecutor's perspective, however, White had the broadest immunity and was under no compulsion to speak anything but the truth. He was represented by an attorney who, at the very least, was readily accessible for legal advice. It could be argued that White's memory was not stale and required no stimulation.[99] Nor is it unreasonable for the prosecutor to have expected that forthright and honest testimony might have yielded information material to the grand jury's inquiry.[100] Finally, White's answers could be found by a jury to have been wilfully false, that is, uttered with knowledge of their falsity.[101]

This example is intended to crystallize the complexity of the perjury trap. The interrogation of White illustrates how factors such as materiality, memory, and mistake might be exploited by a prosecutor to elicit a technical perjury. In terms of entrapment doctrine, it is meaningless to talk about White's predisposition to lie in the sense that the government implanted the idea of lying

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the witness of contradictory statements either by the witness or other witnesses. *See* United States v. Jacobs, 531 F.2d 87, 89 (2d Cir.), *vacated on other grounds*, 429 U.S. 909 (1976); United States v. DelToro, 513 F.2d 656, 664-65 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); People v. Breindel, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (Sup. Ct. 1973), *aff'd*, 45 A.D. 2d 691, 356 N.Y.S.2d 626, *aff'd mem.*, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974). *But see* People v. Tyler, 46 N.Y.2d 251, 261, 385 N.E.2d 1224, 1230, 413 N.Y.S.2d 295, 300 (1978).

[99] Investigations may involve a witness's recollection many years after the event in question. *See, e.g.*, United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); People v. Rinaldi, 44 A.D.2d 745, 354 N.Y.S.2d 482, *aff'd mem.*, 34 N.Y.2d 843, 316 N.E.2d 346, 359 N.Y.S.2d 64 (1974). The event recounted in this hypothetical happened only four months ago. Further, White demonstrated some recollection by volunteering part of the subject matter of the conversation—Singer's request for advice and need for a lawyer. Issues as to the memorability of an event usually involve questions of fact for jury determination. *See* People v. Dunleavy, 41 A.D.2d 717, 341 N.Y.S.2d 500, *aff'd mem.*, 33 N.Y.2d 573, 301 N.E.2d 432, 347 N.Y.S.2d 448 (1973). *But see* People v. Tyler, 46 N.Y.2d 251, 258, 385 N.E.2d 1224, 1228, 413 N.Y.S.2d 295, 299 (1978).

[100] *See* note 97 *supra*.

[101] Assuming false testimony material to the investigation given during a valid grand jury proceeding, it must also be demonstrated that the testimony was wilfully false, that is, that the witness did not believe his testimony to be true. *See* United States v. Dowdy, 479 F.2d 213 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973); United States v. Bronston, 453 F.2d 555 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 352 (1973); United States v. Sweig, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971). "Wilfulness" is a question of fact for the jury, United States v. Letchos, 316 F.2d 481 (7th Cir.), *cert. denied*, 375 U.S. 824 (1963), and may be inferred from proof of falsity itself. United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

into an otherwise truthful person. However, if White could show that the government deliberately contrived a procedure to ambush him into perjury, he might properly invoke an entrapment defense under the objective formula, as well as under principles of due process.

Having seen the perjury trap at work, it is necessary to explore the case law on the subject. The judicial doctrines are various, inconsistent, and generally unsatisfactory from an analytical standpoint. After discussing the law, I will return to White's case, and propose a test to be applied and factors to be considered in analyzing the perjury trap.

III. PERJURY AND ENTRAPMENT: VARIETIES OF JUDICIAL DOCTRINE

A. *Use of Oppressive Tactics to Procure Perjury*

One of the first reported cases to consider an entrapment attack upon a perjury indictment was *United States v. Remington*,[102] a "red menace" case that reveals some of the opportunities for prosecutorial abuse of the perjury offense. Apart from its historical significance,[103] *Remington* would not be notable except for a powerful dissent by Learned Hand articulating the principle that oppressive government tactics may excuse perjury.[104]

William Remington was indicted for perjury by a federal grand jury in New York for denying prior membership in the Communist

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[102] 208 F.2d 567 (2d Cir. 1953), *cert. denied*, 347 U.S. 913 (1954).

[103] *Remington* is one of several perjury cases stemming from grand jury or other official investigations concerning internal security and communism. *See, e.g.*, United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959); United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954); United States v. Neff, 212 F.2d 297 (3d Cir. 1954); United States v. Perl, 210 F.2d 457 (2d Cir. 1954); Vetterli v. United States, 198 F.2d 291 (9th Cir.), *vacated on other grounds*, 344 U.S. 872 (1952); United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); United States v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955).

Much has been written about official and unofficial "witch-hunts" during this period. *See, e.g.*, A. BARTH, GOVERNMENT BY INVESTIGATION (1955); M. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977); R. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1950 (1952); N. WEYL, THE BATTLE AGAINST DISLOYALTY (1951). Little has been written, however, about the aggressive use of the grand jury to indict for perjury individuals who presumably could not otherwise be charged with criminal offenses. It may be no coincidence that in a climate of political crisis, when the public craves victims, zealous and ambitious prosecutors frequently seek to satisfy that appetite by resorting to perjury charges against persons vulnerable because of associations held or utterances made many years ago. It may well be that every one of these cases, in reality, is a perjury trap.

[104] 208 F.2d at 571-75.

Party.[105] He was convicted after a jury trial, but the judgment was reversed because of error in the jury charge.[106] Rather than retrying Remington on the original indictment, the government secured a second indictment against him. This indictment charged Remington with giving false testimony at his trial in defense to the first indictment; this testimony also related to his affiliation with the Communist Party.[107] Remington was convicted and, on appeal, asserted two interrelated grounds for reversal. He claimed, first, that the first grand jury proceeding involved government misconduct of such flagrance that any fruits stemming from it should be suppressed. Second, he alleged that the government impermis-

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[105] The defendant had been summoned in May, 1950, before a grand jury for the Southern District of New York investigating "possible violations of the espionage laws." He was questioned about his alleged membership in the Communist Party from 1934 to 1944. The charge of perjury was predicated on the question: "At any time have you ever been a member of the Communist Party?" to which Remington responded under oath, "I have never been." *See* 191 F.2d 246, 248 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952).

The validity of the indictment was sustained over a claim that the question put to Remington was ambiguous. The Second Circuit held that the indictment validly charged Remington with perjury because it accused him of not believing his statement denying membership. "The further allegation that he had in fact been a member of the Party was surplusage, but proof of the fact of membership might be relevant on the issue of his belief that he had been a member." *Id.* 248 (footnote omitted). *See* MODEL PENAL CODE § 208.20, Comment at 117 (Tent. Draft No. 6, 1957) (criticizing as "disquieting" the Remington prosecution under the above indictment).

[106] 191 F.2d 246 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952). The trial court charged the jury that, in order to find membership in the Communist Party, it was required to find that Remington "performed the act of joining the party." *Id.* 248. The Second Circuit found the charge defective in failing to specify what overt acts would "furnish a rational basis for inferring what the accused thought constituted membership" so that the accused's testimony could be shown as false under the requisite standard of proof. *Id.* 248-50.

In petitioning the Supreme Court for certiorari from the refusal of the Second Circuit to dismiss the indictment, Remington pressed two claims. First, he argued that the foreman of the grand jury that indicted him was collaborating with the chief prosecution witness in a publishing venture whose success depended on Remington's indictment. Second, he argued that the prosecutor deliberately withheld information about this collaboration from defendant's counsel and then sought to suppress the information when it became known to defense counsel from other sources. Remington v. United States, 343 U.S. 907 (1952). Certiorari was denied, with Justices Black and Douglas dissenting. *Id.*

[107] Testifying in his own defense at the first trial, Remington made five statements that became counts for perjury in the second indictment: (1) denial of attendance at Communist Party meetings; (2) denial of delivery to one Elizabeth Bentley of information to which she was not entitled; (3) denial that he had ever paid Communist Party dues; (4) denial that he had ever solicited members for the Communist Party; and (5) denial that he had any knowledge of the existence of the Young Communist League at Dartmouth College where he had been a student from 1934 to 1939. Remington was convicted of counts two and five, acquitted on count four, and the jury was unable to agree on counts one and three. 208 F.2d at 568.

sibly lured him into the commission of perjury at his first trial and should thus be barred from prosecuting him for it.[108]

Without deciding whether the government in fact was guilty of misconduct before the first grand jury, a majority of the court rejected Remington's "new and novel argument." [109] Finding that there existed no causal connection between what happened in the grand jury proceeding and Remington's testimony at his first trial, the court concluded that Remington was under oath to speak the truth and could not "lie with impunity." [110] The court found, moreover, that Remington's asserted defense of entrapment had only the most superficial applicability. In the majority's view, the entrapment defense is available only when the defendant's criminal design originates with the government and not with the accused. To say that the government originated perjury when it questioned Remington would be to permit entrapment to be invoked in every case in which the government questions a witness and the witness lies. The majority concluded that such a result not only would be illogical but also would "weaken our judicial process." [111]

Judge Hand viewed the matter differently. Observing that "the present time is hardly a propitious season to abate [our] vigilance" over the misuse of "unlimited and unchecked" governmental power manifested by ex parte grand jury examination,[112] Judge Hand decried the manner in which the original perjury indictment was obtained. He focused on the government's outrageous treatment of Remington's wife, who was examined continuously for four hours about her husbands's connection with the Communist Party. Mrs. Remington steadfastly resisted her interrogators, whose questions, in Judge Hand's view, often invaded the marital privilege. She pleaded without avail for "something to eat," that she was "tired," that her mind was "getting fuzzy," and that she wanted to consult her lawyers, but the barrage of questioning continued.[113] Worn down, she finally capitulated and told the

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[108] *Id.*

[109] *Id.*

[110] *Id.* 569-70.

[111] *Id.* 570-71.

[112] *Id.* 573.

[113] *By Mr. Donegan* [the prosecutor]:

> Q. Well, do we have to go through all this background? We are right down to the issue right now, after all this time we have just reached the question now. Why not answer that question, and then we'll postpone it for another day; if you answer that question, we'll postpone it for another day. That isn't going to involve you, is it? It couldn't involve you. All you have to do is say yes or no as to whether that money was for the Communist Party. And your yes or no isn't going to decide the issue, I'll

examiners what they wanted to hear, namely, that her husband had given money to the Communist Party.[114] This critical piece of testimony followed fast upon the coup de grâce—the false admonition from the grand jury foreman, in the presence of the prosecutor, that the witness had no privilege to refuse to answer a question, when in reality the question indeed involved a confidential communication between husband and wife that was privileged from disclosure.[115]

Judge Hand scarcely suggested that a witness before a grand jury should be coddled. "[F]aced with a patently unwilling wit-

tell you that; it's something else that exists. You know that I wouldn't ask you questions—you can't accuse me of fishing in here. I haven't learned anything yet. A. Well, I don't want to answer.

By the Foreman:

Q. Mrs. Remington, I think that we have been very kind and considerate. We haven't raised our voices and we haven't shown our teeth, have we? Maybe you don't know about our teeth. A witness before a Grand Jury hasn't the privilege of refusing to answer a question. You see, we haven't told you that, so far. You have been asked a question. You must answer it. If a witness doesn't answer a question, the Grand Jury has rather unusual powers along that line. We are, to a certain extent, what you might call a judicial body. We can't act, ourselves. Our procedure is, when we get a witness who is contemptuous, who refuses to answer questions, to take them before a Judge. Now, at that point there will be a private proceeding. He will instruct the witness to answer the question. Then we come back here and put the question again. If the witness refuses to answer the question, we take him back to Court and the Judge will find him in contempt of Court and sentence him to jail until he has purged himself. "Purging," in that case, is answering the question. Now, I have already pointed out to you that you have a question from the Special Assistant to the Attorney General: Did your husband or did he not give this money to the Communist Party? You have no privilege to refuse to answer the question. I don't want at this time to—I said "showing teeth." I don't want them to bite you. But I do want you to know that. And remember, you have a very sympathetic body here. We want to avoid anything like that. I didn't mention, of course, the second proceeding before a jury is of course a public hearing. And I mention that to you in fairness because I do know that you have a certain grave concern about what your obligations are, and I think in fairness to you we should tell you that. And in view of the time and, I think, the empty stomachs of all the Jurors—I know mine is very empty—I think we can very quickly dispose of things if you will just proceed now. I think you have in your heart answered the questions as to what your procedure should be. (To Mr. Donegan) Do you want to put the question again? Q. Can you find that question, Mr. Reporter? A. My answer is yes.

Id. 572 n.1.

[114] The incommunicado interrogation of Mrs. Remington strikingly resembles police interrogation processes, which use psychological and other pressures to overbear the will of the individual, forcing a confession of facts that the interrogators want to hear. The reliability of such a confession is clearly suspect. *See* Miranda v. Arizona, 384 U.S. 436, 445-58 (1966); Escobedo v. Illinois, 378 U.S. 478, 488-90 (1964); 3 J. WIGMORE, EVIDENCE § 833 (Chadbourn rev. 1970).

[115] 208 F.2d at 573. *See* 8 J. WIGMORE, EVIDENCE §§ 2332-2341. (McNaughton rev. 1961).

ness, the grand jury was free to press her cross-examination hard and sharp; truth is more important than the sensibilities of the witness." [116] The facts in *Remington,* however, disclosed deliberate intimidation, overt threats, physical coercion, deceit, and relentless interrogation, all of which, in Judge Hand's view, went beyond what was permissible.

Because of the oppressive and deceitful treatment of Remington's wife, Judge Hand would have dismissed the indictment on two separate grounds. First, relying on *Silverthorne Lumber Co. v. United States,*[117] he invoked the familiar exclusionary doctrine that denies the prosecution evidence that it has obtained unlawfully. "I do not see any difference in principle between obtaining the first indictment by the unlawful extraction of evidence, necessary to its support, and obtaining a document by an unreasonable search." [118] In both cases, the judge argued, the evidence and its tainted fruit should be excluded to deter official lawlessness.[119]

Second, distinct from traditional exclusionary rule theory, Hand would have broadened the doctrine of entrapment to embrace Remington's case. Invoking *Sorrells v. United States,*[120] Judge Hand reasoned that the doctrine of entrapment embodies "the repugnance of decent people at allowing officials to punish a man for conduct that they have 'incited' or 'instigated,' and to which by so doing they have made themselves accessories." [121] To be sure, the government did not directly "incite" or "instigate" Remington to repeat his grand jury testimony at his first trial. Judge Hand, however, would not "so narrowly" confine the entrapment doctrine.[122] He noted that Remington had committed himself in the grand jury to a denial of his membership in the Communist Party. Consequently, Remington could not avoid repeating this denial at his perjury trial. "[I]f he did not take the stand, it would have been equivalent to a plea of guilty." [123] Judge Hand found this compulsion, coupled with the government's misconduct in securing the indictment for perjury, sufficient to constitute an entrapment defense. "[T]he question comes down to whether there is any difference between the repugnance that decent people would

116 208 F.2d at 571.
117 251 U.S. 385 (1920).
118 208 F.2d at 575.
119 *Id.* 574.
120 287 U.S. 435 (1932).
121 208 F.2d at 575.
122 *Id.*
123 *Id.*

feel at punishing a man for perjury the officials . . . persuaded him to commit, and the repugnance they would feel if the officials induced him to perjure himself by securing an indictment for perjury against him by illegal means . . . ." [124]

In sum, viewing, as Judge Hand did, the first grand jury proceeding as irretrievably tainted by flagrant governmental misconduct, two things follow: first, Remington's trial testimony was "impelled" by that misconduct; [125] second, having solicited that testimony wrongfully, the government should be estopped as a matter of law from prosecuting him for it. Judge Hand's dissent in *Remington* is a bold and imaginative effort to confront particularly offensive government behavior in the grand jury context. The significant point is that the entrapment doctrine, ordinarily a very narrow defense, was recognized as a due process defense to perjury.

Concededly, no overtly oppressive tactics were used by the prosecutor in the hypothetical interrogation of White; hence no due process claim could reasonably be advanced along the lines of Hand's dissent. However, due process need not be so narrowly construed. If, as argued above, a prosecutor subverts the grand jury for an illegitimate purpose when he or she premeditatedly elicits perjury, this conduct surely implicates due process just as if the prosecutor elicited perjury by physical or psychological coercion. Under the broadened definition of entrapment espoused by Judge Hand, White could properly invoke due process as a bar to prosecution.

B. *A Perjury Ambush*

As just discussed, *Remington* concerned the overall fairness of the grand jury proceeding, specifically whether outrageous interrogation of a witness should excuse perjury. A premeditated attempt by the prosecutor to extract perjury was not at issue. That subject was squarely faced four years later by the Eighth Circuit in *Brown v. United States.*[126] The defendant, Brown, a supervisory official in the Internal Revenue Service's Office of Collection in Chicago, was assigned to a task force to investigate alleged corruption by the Collector of Internal Revenue in St. Louis, Missouri.[127]

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[124] *Id.*

[125] *See* Harrison v. United States, 392 U.S. 219 (1968) (defendant's trial testimony held to be "impelled," and therefore tainted, by the prosecution's use of illegally obtained confession).

[126] 245 F.2d 549 (8th Cir. 1957).

[127] The investigation was authorized by the Commissioner of Internal Revenue on the recommendation of Honorable George H. Moore, Chief Judge of the United States District Court for the Eastern District of Missouri. *Id.* 550.

Brown was responsible for furnishing personnel for the investigation. At a meeting of the task force on May 3, 1950, Brown, in the presence of three other government investigators, expressed disbelief in allegations of misconduct by the Collector and suggested that the complaints be spot checked. Two months later, after additional meetings and discussions, the investigation concluded and a report issued recommending certain operational changes in the Collector's office but finding no evidence of misconduct. A second investigation conducted some six months later determined that the first investigation had been conducted in an honest, sincere, and intelligent manner.[128]

For reasons not clear from the record, a federal grand jury was impaneled in Omaha, Nebraska four years later to investigate whether the defendant and others had conspired to or otherwise impeded any of the foregoing investigations.[129] Brown was ordered to report to the local internal revenue office in Omaha, Nebraska on a "special undisclosed assignment." On his arrival, he was brought to the office of the United States Attorney and taken immediately into the grand jury room at which time he was interrogated for two hours about events that had occurred four years earlier.[130] On the basis of his responses to questions relating to the May 3 meeting, Brown was indicted on seven counts of perjury, and a jury subsequently convicted him of four.[131]

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[128] *Id.* 551. The purpose of the second investigation, in which more than 260 government employees were interviewed, is not stated in the record. Apparently there were allegations that the first investigation was dishonestly conducted. With respect to the defendant, the report found that his role was limited to assigning personnel to assist in the investigation "and that he in nowise influenced anyone in the performance of it." *Id.*

[129] *Id.*

[130] Some 365 questions were put to the defendant in that period of time, most regarding the May 3 meeting, and seven answers were chosen as the basis for the perjury charges. The prosecutor, when questioning the defendant before the grand jury, knew how the defendant and the other three parties to the May 3 meeting remembered the conversation because each had already given a sworn statement to a government investigator. Further, prior to Brown's testimony, the three other participants had given the grand jury their version of the conversation. *Id.* 551, 555.

[131] The questions and answers on which the defendant was convicted are:

"Count 1. Q. All right, sir, but, did you at any time that day or evening, or at any time, state in words or substance, that these charges that were made by Moore were preposterous or absurd? A. No, sir.

"Count 2. Q. As I have indicated to you, we are trying to find out whether this thing was blocked, and if so, who did it, so I will ask you this general question: Did you, Mr. Brown, do anything, or say anything, on or prior to May 3rd, 1950, the date being the date when you were in St. Louis on this occasion, intended or calculated to block or thwart, impede or obstruct or prevent this investigation? A. No, sir.

The court of appeals reversed the conviction on several grounds. First, under the facts, the Nebraska grand jury had no jurisdiction to inquire into matters occurring in Missouri.[132] The court characterized the grand jury as a "roving commission" [133] and condemned the United States Attorney's misuse of his power.[134] Second, the questions put to the witness were not material to the grand jury investigation.[135] The court reasoned that because the grand jury lacked jurisdiction, any answers given by the defendant, however false, could not logically relate to any matter relevant to the grand jury's proper function.[136]

Once it concluded that the grand jury was not functioning as a competent tribunal and that Brown's false answers were not material to any action that the grand jury properly could take, the court went on to consider—although it need not have—the prose-

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"Count 3. Q. Did you do anything or say anything on the 3rd, or prior thereto, to try to influence these men to whitewash Finnegan or to do an inadequate, superficial investigation? A. No, sir.

"Count 7. Q. I previously asked you whether you tried to minimize the charges against Finnegan, or tried to influence them not to do a proper investigation. A. No, sir.

"Q. You say that never happened; is that right? A. I never tried to minimize the investigation; no, sir.

"Q. Or to minimize the charges? A. No, sir.

"Q. Or to influence them not to make a proper investigation? A. No, sir."

Id. 551-52 (footnote omitted). The court intimated that, apart from other considerations, the above questions might not support perjury charges. *Id.* 556. Such questions appear to call for a subjective response by the witness of his understanding of the meaning of the words used. Terms like "influence," "minimize," "block," "thwart," "impede," and "obstruct" are extremely vague, particularly when used as the basis for perjury charges. *See* Bronston v. United States, 409 U.S. 352, 362 (1973) (holding that under the federal perjury statute it is the questioner's burden to frame his questions precisely); note 92 *supra.*

[132] 245 F.2d at 554-55. The government contended that the Nebraska grand jury had jurisdiction because one of the witnesses to the May 3 meeting, following his transfer to Omaha, had made written notations on a letter concerning the Collector. This letter, written in Nebraska, but never sent, was the "only link" to justify jurisdiction of the Nebraska grand jury. *Id.* 552-53. In response to the defendant's motion for acquittal, the district court observed that the Nebraska grand jury investigation "came, in my opinion, perilously close to being a fraud on the jurisdiction of this court." *Id.* 553. Nonetheless, the court found that the significance of the letter, although "almost trivial," *id.*, "could possibly have been articulated into a conspiratorial program." *Id.*

[133] *Id.* 555.

[134] The court commented: "We have not encountered any instances in this Circuit where any [prosecutor] has made such use of a grand jury as that resorted to here." *Id.*

[135] *Id.*

[136] *Id.*

cutor's motivation in haling Brown before the grand jury. The court noted that the prosecutor (1) possessed sworn statements of each party, including Brown, who participated in the May 3, 1950 meeting; (2) knew that the defendant's recollection of the meeting differed from that of the others present, and (3) had already caused the others to testify to their version before the grand jury.[137] With this background, the prosecutor's premeditated design was readily apparent—namely, to elicit testimony from the defendant with the sole purpose to indict him for perjury. "Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." [138]

Although the *Brown* opinion is not altogether clear on this point, it appears that the court would have reached the same result even if the Nebraska grand jury had not been a self-constituted "roving commission" without proper jurisdictional power. To repeat, the prosecutor had sworn statements from all parties to the May 3 meeting when he questioned Brown. The court stated that this prevented the defendant's answers from having any capacity to support even a proper grand jury action. A fair reading of the *Brown* opinion therefore suggests two independent rationales: first, that a perjury prosecution will not lie if the grand jury lacks any authority, thus rendering the questions and answers immaterial; second, that regardless of jurisdiction and materiality, it is impermissible to extract testimony from a witness for the sole purpose of indicting him for perjury.[139]

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[137] *Id.*

[138] *Id.*

[139] Federal district judges have found perjury traps in three other cases dealing with perjury in settings other than the grand jury.

United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956), involved an investigation into the disappearance and death of a military officer while on assignment in Italy in 1944 conducted by a special subcommittee of the House of Representatives. The subcommittee was properly looking into whether existing laws adequately covered the prosecution of such crimes and whether the Department of Defense had functioned adequately in its investigation of the disappearance. The subcommittee had received evidence that Icardi was responsible for the homicide; it also possessed exculpatory statements that Icardi had given previously before several investigative bodies. Icardi appeared before the subcommittee and freely answered the questions, basically reiterating his former statements. The court concluded, based on the testimony of the committee chairman, that Icardi was called as a witness in order either to provide him with a forum to exonerate himself or to put him under oath with a view towards extracting a perjury indictment, neither of which was a valid legislative purpose. Accordingly, the subcommittee was not acting as a competent tribunal. Even assuming competency of the tribunal, however, the indictment was defective because Icardi's answers were immaterial to

Brown is thus squarely on point with the White-Singer example. To be sure, the grand jury in the White hypothetical presumably had jurisdiction to interrogate White about corruption. With knowledge of the tape recording, the prosecutor in good faith could have probed White for information of corruption. The prosecutor did not do this, however. As in *Brown,* the prosecutor had evidence of a prior suspicious conversation involving White, had submitted that evidence to the grand jury, and knew that White faced the dilemma of admitting his embarrassing statements or lying. As in *Brown,* the prosecutor evinced no interest in interrogating White about his knowledge of corruption, but instead focused on the outward details of the conversation. The prosecutor's questions were ambiguous, and occasionally tricky. He furnished the witness no cues to stimulate recall, if indeed White was sincerely forgetful. From all of these considerations, the conclusion is irresistable that White, like Brown, was ambushed for perjury.

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the subject matter of the investigation. Before Icardi was summoned, the subcommittee had in its possession all the information necessary to write its report, including Icardi's version of the event. Icardi had three testimonial options: to remain silent, to confess guilt, or to repeat his earlier denial of guilt. Whatever option Icardi chose, it could have no meaningful effect on the subject matter of the investigation.

In United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959), the defendant, a union official, was recalled before a senate committee investigating improper practices of labor unions and asked questions concerning alleged assaults on dissident union officials. As in *Icardi,* the committee had before it substantial evidence contradicting Cross's denials as well as an earlier flat denial by the witness himself. The court reasoned that nothing Cross could say would materially assist the committee. If Cross adhered to his earlier denial, the committee gained no additional facts. If Cross made admissions, it would merely corroborate information already before the committee. If Cross refused to testify, the committee learned nothing. In short, Cross was recalled "for the purpose of emphasizing the untruthfulness of his prior denial and to render him more liable to criminal prosecution" for perjury. *Id.* 309. Moreover, because the committee sought to elicit facts more properly the duty of a prosecutor or committing magistrate, it was not pursuing a bona fide legislative purpose and therefore was not acting as a competent tribunal.

In United States v. Thayer, 214 F. Supp. 929 (D. Colo. 1963), neither the competency of the tribunal—the Securities and Exchange Commission—nor the materiality of the inquiry into the defendant's representations to prospective purchasers of stock were at issue. The question, as in *Remington,* was whether the methods used by the government in obtaining testimony demonstrated unfairness of a sufficient magnitude to require dismissal of the indictment. Among the considerations deemed relevant by the court were the recalling of the defendant before the Commission one month after he had already testified, with at least an anticipation that he might perjure himself; the failure to warn adequately the defendant that a perjury charge was being contemplated and would follow if the defendant persisted in giving false responses; "zeroing in" on the witness without his realization of the true import of the inquiry, and the "disparity of knowledge as between the Government and the accused." *Id.* 933. The court observed: "If it should appear that the Government was substantially certain prior to the April 19th hearing that the defendant would give false answers, it would then follow that the testimony so induced should not be received in evidence." *Id.* 932.

C. *The Subjective Approach to the Perjury Trap*

Judge Hand's reference to due process doctrine in his *Remington* dissent and the Eighth Circuit's discussion in *Brown* of prosecutorial purpose and materiality suggest that the entrapment defense theoretically is available in cases in which the interrogator uses oppressive or deceitful tactics to procure perjury. The majority view of entrapment, however, focuses on the defendant's predisposition to commit the crime. Under this standard, the courts generally have rejected the entrapment defense to perjury.

Thus, consistent with the majority opinion in *Remington*, the Seventh Circuit stated: "[I]t was defendant's *predisposition* to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient." [140] Similarly, the Fourth Circuit held that "(w)hile the United States Attorney, by inviting the defendant to testify before the grand jury, may have provided defendant with the opportunity to commit perjury, the record is absolutely devoid of any evidence that the United States Attorney *suggested what defendant should say* when he testified." [141] Likewise, the Sixth Circuit stated that "[the witness] was forced to tell what he knew about the alleged events. He was not forced, induced, or coerced, however, into giving *false* testimony before the grand jury." [142] Finally, the Second Circuit held that "[t]here is no slightest indication that the government instigated the false testimony or *implanted* the idea of lying in [the witness's] mind." [143]

Although factually accurate, these statements are beside the point. It is illogical to apply to perjury a subjective "predisposition" test of entrapment. The defendants in the above cases did not claim that the government "implanted the idea of lying" in their minds, secured false testimony by threats, or suggested what they should say. Rather, the claim is that, regardless of the witness's predisposition, the government's conduct in baiting the witness into perjury is a perversion of the grand jury's function and should not be permitted.

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[140] United States v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974) (emphasis added), *cert. denied*, 426 U.S. 911 (1976).

[141] United States v. Dowdy, 479 F.2d 213, 230 (4th Cir. 1973) (emphasis added), *cert. denied*, 414 U.S. 866 (1973).

[142] United States v. Lazaros, 480 F.2d 174, 179 (6th Cir. 1973) (emphasis in original), *cert. denied*, 415 U.S. 914 (1974).

[143] United States v. Fiorillo, 376 F.2d 180, 184 (2d Cir. 1967) (emphasis added).

The illogic of analyzing perjury in terms of predisposition is illustrated by *United States v. Lazaros*,[144] a decision by the Sixth Circuit. The defendant, Lazaros, an informant for the federal government, told an investigator with the Internal Revenue Service (IRS) that several IRS officials and two former Detroit city officials had accepted illegal payoffs from underworld figures.[145] The investigator believed Lazaros,[146] but warned him that false statements violated federal law.[147] A grand jury was impaneled to investigate the charges. Lazaros was called as a witness but refused to testify, asserting a not unreasonable fear for his life.[148] He was granted immunity, persisted in his refusal, was held in civil contempt, and finally purged himself by answering the prosecutor's questions.[149] Based on his answers, Lazaros was indicted and convicted of twelve counts of perjury.

On appeal, Lazaros claimed that the government extracted testimony from him solely to charge him with perjury. Apparently, the accused officials had testified and denied Lazaros's accusation prior to his testifying.[150] Moreover, the prosecutor admitted that by the time Lazaros testified, the government had concluded that all of the officials accused by him were innocent of his charges.[151] Indeed, when Lazaros testified, the grand jury probe "was nearly complete." [152]

The court rejected Lazaros's claim that he was entrapped.[153] In the court's view, Lazaros might have been compelled by the

144 480 F.2d 174 (6th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

145 *Id.* 175-76. Lazaros stated that he observed these individuals receive envelopes containing money at a Christmas party.

146 *Id.* 175.

147 18 U.S.C. § 1001 (1976) states that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations" is punishable by up to five years imprisonment and a fine of up to $10,000.

148 Lazaros claimed, and it was not disputed, that another government informant had been killed by poisoning while in the county jail one week earlier. 480 F.2d at 176 n.3.

149 *Id.* 175-76. Lazaros testified to the same facts that he had previously told the IRS; namely, that he personally witnessed corrupt payments to public officials.

150 *Id.* 175.

151 *Id.* 177.

152 *Id.*

153 The court also rejected the claim that Lazaros's testimony was coerced. Lazaros contended that if he persisted in refusing to testify and went to jail, he would be killed; that if he testified that no bribe had taken place he would be indicted, under 18 U.S.C. § 1001 (1976), for giving false statements to a government official, and that if he retold the story he had given to the IRS he would be convicted of perjury. The court said that this defense was presented to the jury and it found against Lazaros. 480 F.2d at 176. The court also concluded, without analysis, that Lazaros "apparently" could not have been convicted of violating 18 U.S.C. § 1001 (1976). 480 F.2d at 176 n.4.

government to give testimony, but he was not compelled to give false testimony.[154] He was neither innocent nor not predisposed to lie.[155] Moreover, it was entirely proper for the prosecutor to question Lazaros before the grand jury: his testimony was "clearly material" to the investigation.[156] Lazaros was the "main accuser" of the government officials and his testimony related to the legitimate scope of the investigation.[157] Consequently, the grand jury was entitled to summon him for questioning.

Under the reasoning in *Lazaros,* the Sixth Circuit would probably also reject White's entrapment defense. The hypothetical interrogation related to arguably corrupt advice given by White to an individual under investigation and, therefore, the *Lazaros* court would conclude, was material. There is no indication that the prosecutor suggested what White should say or that White was not predisposed to lie. Accordingly, the court would find that the entrapment defense was not available.

Denying Lazaros and White the entrapment defense, however, is unfair, particularly because an entrapment formula that looks to the defendant's predisposition is meaningless in the perjury context.[158] In contrast, variations of entrapment that address the government's conduct—the objective and due process tests—are more meaningful. Under such tests, Lazaros and White might have valid defenses. The inquiry would be directed at the prosecutor's purpose and methods of questioning the witness. Specifically, it would seek to determine whether the procedure was an honest effort to secure meaningful information, or whether it was a deliberate attempt to bait the witness into perjury. Thus, a principal inquiry would be the importance of Lazaros's or White's testimony to the investigation. This conclusion would be important in assessing the prosecutor's purpose in questioning the witness. If the prosecutor interrogated either Lazaros or White without a sincere belief that his testimony would further the investigation, the question naturally arises why he was summoned. When a prosecutor does not expect to obtain any meaningful information, there is at least a suggestion that his purpose was to elicit perjury. This suggestion becomes an almost irresistible conclusion if the prosecutor secretly holds evidence that he knows will contradict the witness's testimony.

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[154] *Id.* 179.

[155] *Id.*

[156] *Id.* 178.

[157] *Id.* 177.

[158] *See* text following note 78 *supra.*

By emphasizing the witness's predisposition to lie and discounting the government's conduct in setting the perjury trap, the courts, despite their theoretical role as supervisory bodies to ensure fairness in the grand jury, in practice condone prosecutorial overreaching. *Brown* suggested that perjury may be excused if elicitation of perjury was the government's sole purpose in questioning the witness.[159] As *Lazaros* implicitly demonstrates, however, the *Brown* test is an exceedingly difficult standard to meet.[160] Further, in weighing a claim of dishonest prosecutorial conduct against a conceded predisposition to lie, the courts might be expected to side with the prosecutor.

The First Circuit's decision in *United States v. Chevoor*[161] illustrates this point. In the course of an investigation into loansharking activities, the government electronically intercepted a conversation between the defendant, Chevoor, apparently a loanshark victim, and Pellicci, a target of the investigation, in which usurious payments were discussed. When questioned by a federal investigator who served him with a grand jury subpoena, Chevoor made denials that were contradicted by the intercepted recording. Chevoor was told that he was not a target of the investigation, that the government had reason to believe that he was not telling the truth, and that he could be expected to be prosecuted for perjury if he persisted in his denials before the grand jury. He was not informed of the recorded conversation nor that he could remain silent and avail himself of the assistance of counsel. Before the grand jury the same questions were asked and Chevoor made the same denials that resulted in his being indicted for perjury.[162]

The district court dismissed the indictment on the ground that the prosecutor's "prime purpose" in questioning Chevoor before the grand jury was "to get him to testify falsely under oath."[163] Moreover, despite the government's assurances, the court felt that Chevoor was a "potential, if not probable, grand jury target."[164]

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[159] *See* text accompanying notes 126-39 *supra.*

[160] This is particularly true if the court has adopted an expansive view of materiality. *See* cases cited note 97 *supra.*

[161] 526 F.2d 178 (1st Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

[162] *Id.* 179. The indictment under 18 U.S.C. § 1623 (1976 & Supp. III 1979) alleged that Chevoor made material false statements with respect to whether he "had ever owed money to Pellicci; whether he had ever discussed with Pellicci payments due the latter; and whether he had ever discussed with Pellicci the fact that other individuals owed Pellicci money." *Id.*

[163] United States v. Chevoor, 392 F. Supp. 436, 442 (D. Mass.), *rev'd,* 526 F.2d 178 (1st Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

[164] *Id.* 439.

As such, he should have been advised of his right to remain silent.[165] For the district court, this failure to advise Chevoor of his rights, coupled with refusal to apprise him of the intercepted recording, "ensnared" the witness in a situation in which he would inevitably become a defendant. That is, Chevoor could be indicted for violating a federal statute [166] if he testified inconsistently with the statements he gave the federal investigator, and he could be indicted for perjury if he testified consistently with those statements.[167] "By forcing the defendant to testify, without alerting him in any way as to his precarious position, the Government turned the screw too tightly . . . ." [168]

The court of appeals reversed the district court and reinstated the indictment.[169] Although the court had "considerable sympathy" for the lower court's view of the defendant's plight [170]—the unknown interception; his prior denial of that conversation; government assurances that he was not a target; summonses without warnings for the purpose of asking him the same questions he previously had denied—it did not view the defendant as impaled on the horns of the trilemma of perjury, self-incrimination, or contempt. "We have concluded that Chevoor faced only the alternatives of perjury or telling the truth. Self-incrimination was not a foreseeable possibility and, therefore, there was no right to remain silent as to which he should have been warned." [171] Further, the witness was not summoned with the "sole purpose" of extracting perjury from him.[172] The grand jury was conducting a "legitimate investigation" and although "the government did not entirely cooperate with Chevoor . . . it is not required to do so." [173] Finally, even though

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165 *Id.*

166 *See* note 147 *supra.*

167 392 F. Supp. at 441-42.

168 *Id.* 442.

169 United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

170 *Id.* 182.

171 *Id.* The court of appeals concluded that Chevoor was not liable for prosecution under 18 U.S.C. § 1001 (1976) on the ground that his denials to the investigators were not "statements" within the contemplation of that statute. Nothing in the record, however, indicates that Chevoor was aware that "[s]elf-incrimination was not a foreseeable possibility." 526 F.2d at 182. The government neither advised him of this right, nor of the inapplicability of 18 U.S.C. § 1001 (1976), nor of his right to remain silent. For all that Chevoor knew, he faced only the options of perjury, self-incrimination, or contempt.

172 526 F.2d at 185.

173 *Id.* The court noted that the prosecutor advised Chevoor prior to his testimony that he had reason to believe Chevoor was lying, and added that if Chevoor committed perjury he could be expected to be prosecuted for it. *Id.*

the government might have expected Chevoor to perjure himself,[174] it was not impermissible to call him to testify. "[I]t was possible (even though unlikely) that when it came to the crunch of testifying under oath, with a transcript, Chevoor would succumb to the truth." [175] Nor did the government's actions reach the level of inexcusable conduct that Judge Learned Hand condemned in *Remington*.[176] In sum, because the government's conduct was not unduly deceitful or coercive, and because the witness deliberately lied, the defense of entrapment was not available.[177]

Chevoor illustrates the difficulty of assessing the fairness of grand jury interrogation leading to perjury. As the victim of a loanshark operation, Chevoor presumably possessed relevant information about persons engaged in such crime. Chevoor was not a target of the investigation—the prosecutor "had no ax to grind" with him.[178] Under these circumstances, there is every reason to expect the prosecutor to strenuously seek truthful testimony and not attempt to trap the witness into committing perjury.[179]

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[174] *Id.*

[175] *Id.*

[176] *Id.* *See* text accompanying notes 112-25 *supra.*

[177] In United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), *rev'd*, 425 U.S. 564 (1976), the court of appeals affirmed an order of the district court suppressing allegedly perjurious grand jury testimony on the ground that the questioning of the defendant before the grand jury "smacked of entrapment." *Id.* 1053. The government knew, prior to calling Mandujano before the grand jury, that the witness had discussed the purchase of narcotics with a federal agent. In questioning Mandujano, the prosecutor precisely tracked the facts of the contact between the agent and Mandujano. According to the court of appeals, Mandujano was a "putative defendant," and the government should have advised him both of his status and of his right to remain silent. The prosecutor "must have known" that any answer Mandujano gave to the questions would be either self-incriminating or perjurious. It was unlikely that Mandujano would confess to a crime. Thus, "[t]he inference is easily drawn that the attorney's questioning was primarily baiting Mandujano to commit perjury." *Id.* 1055. This was a "totally unfair procedure," so far "beyond the pale of permissible prosecutorial conduct" that it represented a due process violation and, accordingly, the Fifth Circuit felt that the testimony should have been suppressed. *Id.* 1058.

The Supreme Court reversed. United States v. Mandujano, 425 U.S. 564 (1976). The Court found that Mandujano was sufficiently warned of his rights and, in any event, was "sworn to tell the truth before a duly constituted grand jury . . . [and therefore] will not be heard to call for suppression of false statements made to the jury." *Id.* 582. Citing Brown v. United States, 245 F.2d 549 (8th Cir. 1957), the Court stated that "nothing remotely akin to 'entrapment' or abuse of process is suggested by what occurred here."

See also United States v. Wong, 553 F.2d 576 (9th Cir. 1974), *rev'd*, 431 U.S. 174 (1977) (Ninth Circuit's holding that grand jury witness vulnerable to incrimination or perjury should be given *Miranda* warnings reversed on ground that failure to advise witness about rights does not excuse perjury).

[178] LaRocca v. United States, 337 F.2d 39, 42 (8th Cir. 1964).

[179] To be sure, it is possible that a witness indicted for perjury might be more amenable to cooperate with the government than one not so indicted. Even as-

It is unclear from the record why the government did not make a greater effort to induce Chevoor to tell the truth, for example, by actually disclosing the existence of evidence that would prove his denials false.[180] It might be that the government believed that by disclosing the existence of the tape recording it would be violating secrecy requirements,[181] although this is doubtful.[182] It might also be that it was feared that such disclosure would impede the investigation by providing the witness with a chance to tailor his testimony to evidence already in the government's possession.[183] The latter appears to be the more likely explanation for the government's reticence.

The court's treatment of the prosecutor's failure to advise Chevoor of his right to remain silent is also troubling. A grand jury witness ordinarily has no constitutional right to a warning of his rights.[184] Nonetheless, warnings are virtually always given,[185] a practice widely approved by commentators.[186] Further, such warnings would have been particularly appropriate—indeed, perhaps necessary—in Chevoor's case. Chevoor's prior statements to the government investigator strongly suggested that he would lie before the grand jury. This was particularly likely in light of the possibility, recognized by the district court, that Chevoor could be prosecuted for his false statements to the government investigator.[187]

suming, however, that the government might use the perjury indictment as leverage to induce cooperation, it should be able to demonstrate the necessity of this course of action. Further, the government would presumably prefer truthful and uncoerced testimony to testimony compelled under the threat of a perjury prosecution.

180 The courts do not require that a prosecutor inform a witness of contradictory evidence, either in the form of recorded evidence or live witness testimony. *See* cases cited note 98 *supra.*

181 United States v. Winter, 348 F.2d 204, 210 (2d Cir. 1965) ("it would appear that the Federal Rules [FED. R. CRIM. P. 6(e)] prohibit such disclosure"); People v. Breindel, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (Sup. Ct. 1973) ("Such disclosure also jeopardizes the secrecy of the investigation and hence its chances of success with respect to the targets thereof."), *aff'd,* 45 A.D.2d 691, 356 N.Y.S.2d 626, *aff'd,* 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

182 *See* text accompanying notes 267 & 268 *infra.*

183 People v. Pomerantz, 46 N.Y.2d 240, 249, 385 N.E.2d 1218, 1223, 413 N.Y.S.2d 288, 294 (1978) ("Nor should the prosecutor be required to confront defendant with the recording, lest he conform his testimony to what was already known and fail to add to the prosecutor's knowledge."); People v. Breindel, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (Sup. Ct. 1973) ("Providing an uncooperative or hostile witness with the type of information requested in this case permits him to tailor his testimony to matters already known to the Grand Jury, thereby defeating the purpose of calling him."), *aff'd,* 45 A.D.2d 691, 356 N.Y.S.2d 626, *aff'd,* 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

184 *See* notes 34, 35 & 38 *supra.*

185 *See* note 88 *supra.*

186 *See* note 38 *supra.*

187 392 F. Supp. at 440. The court of appeals extensively considered whether an "exculpatory no" was within the purview of a false statement within the mean-

As noted above, a prosecutor generally has no constitutional duty to warn a grand jury witness of his rights. Nonetheless, the prosecutor's unexplained deviation from ordinary practices and the particular vulnerability of Chevoor permit an inference that the failure to give protective warnings was part of an attempt to procure perjury. In sum, in certain circumstances, the absence of warnings by a prosecutor may be a relevant consideration for purposes of perjury trap analysis.

White could not claim, as Chevoor did, that the failure to advise him of his rights circumstantially suggests a premeditated design to secure perjury. White was fully advised of his rights and was assisted by counsel. Nor could a prosecutor exploit inexperience in a witness of White's sophistication as easily as he might if dealing with a less knowledgeable or sophisticated witness. *Chevoor,* however, is relevant to White's case in that it demonstrates how a prosecutor, forcing the witness either to admit having made corrupt statements or falsely to deny having made them, and having prepared a foundation to prove the witness's denial false, might bait the witness into the trap.

D. *New York's More Enlightened Approach*

In keeping with their restrictive approaches to entrapment, the courts have limited the availability of the entrapment defense in perjury cases to situations in which the procedure unduly oppressed witnesses [188] or deceived the grand jury.[189] This approach is predictable first, because of the distorted focus on the witness's predisposition and second, because of the harsh attitude towards perjury. Without condoning perjury, however, the courts could assess properly the conduct of the prosecutor in deciding whether to abort a prosecution because of unfairness.

Over the past several years New York state courts have considered the issue of the perjury trap with increasing attention and alarm. At least two reasons exist for this trend. First, the pro-

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ing of 18 U.S.C. § 1001 (1976). Although the court concluded that such a response was not covered by the statute, a fair reading of the discussion suggests that the question is far from clear or settled, as the prosecutor conceded on appeal. 526 F.2d at 180 n.3. In any event, this appears beside the point. The proper inquiry should be whether the witness at the time reasonably viewed himself as subject to incrimination. It is in this situation that the failure to advise the witness of his rights becomes crucial. *See* Raley v. Ohio, 360 U.S. 423 (1959).

[188] *E.g.*, United States v. Remington, 208 F.2d 567 (2d Cir. 1953).

[189] *E.g.*, Brown v. United States, 245 F.2d 549 (8th Cir. 1957).

liferation of special prosecutors and special grand juries[190] has required the courts, in their role as supervisors of the grand jury, to carefully scrutinize the work of these bodies.[191] Second, the indictments by these grand juries of several prominent figures on charges of perjury[192] understandably invited judicial concern, particularly with regard to allegations of misuse of power by prosecutors involved in the highly competitive enterprise of ferreting out crime. The dismissals by lower courts of several of these perjury indictments on grounds of entrapment has underscored the alarm.[193]

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[190] In the past eight years, governors of New York have appointed special prosecutors and special grand juries to investigate corruption in the New York City criminal justice system, N.Y. Code of Rules and Regulations tit. 9, §§ 1.55-59 (1972); to investigate the New York State nursing home industry, *id.* § 3.4 (1975); to inquire into the Attica State Prison rebellion, *id.* § 1.78 (1973); to investigate alleged wrongdoing by a police commissioner, a district attorney, and members of their respective staffs, *id.* § 3.14 (1975) and to investigate political corruption in Onondaga County, *id.* § 3.42 (1976).

[191] The courts have had to pass on numerous issues ranging, for example, from the power of the grand jury to investigate a particular subject matter, Dondi v. Jones, 40 N.Y.2d 8, 351 N.E.2d 650, 386 N.Y.S.2d 4 (1976); the enforceability of subpoenas, Cunningham v. Nadjari, 39 N.Y.2d 314, 347 N.E.2d 915, 383 N.Y.S.2d 590 (1976); Sigety v. Hynes, 38 N.Y.2d 260, 342 N.E.2d 518, 379 N.Y.S.2d 724 (1975), and the validity of indictments for perjury stemming from these special investigations, People v. Tyler, 46 N.Y.2d 264, 385 N.E.2d 1231, 413 N.Y.S.2d 302 (1978); People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978).

[192] *See* notes 12-14 *supra* & accompanying text.

[193] In People v. Monaghan, N.Y.L.J., Nov. 14, 1975, at 8, col. 3 (Sup. Ct.), *aff'd*, 55 A.D.2d 1056, 391 N.Y.S.2d 778 (1977), perjury charges against George Monaghan, an attorney and former New York City Police Commissioner, were dismissed on the ground that the prosecutor's questions before the grand jury were designed to trap Monaghan into committing perjury rather than furthering the grand jury's investigation. The grand jury had been investigating whether certain persons had conspired to extort money from an individual named Olsberg. Monaghan, in his capacity as an attorney, was present at a meeting when alleged threats against Olsberg were made. Olsberg, acting under the prosecutor's authority, tape recorded the meeting. Monaghan was called before the grand jury, granted immunity, and questioned about the statements. His denials led to an indictment for perjury. In dismissing the indictment, the court found that Monaghan, an old man, was unable to recall clearly the events of several months earlier, and the prosecutor did little to refresh his recollection. The transcript of the testimony, reprinted in the opinion, revealed a witness who "was ready to testify fully with candor" but was not permitted to by the prosecutor because "[w]hat was being sought was the color of a false statement on which to predicate an indictment." *Id.* 9, col. 3 (citation omitted).

In People v. Blumenthal, N.Y.L.J., Apr. 16, 1976, at 7, col. 2 (Sup. Ct.), *aff'd*, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1976), *appeal denied*, 41 N.Y.2d 1011, 395 N.Y.S.2d 1029 (1977), Albert Blumenthal, majority leader of the New York State Assembly, was indicted for perjury based on statements allegedly made at a meeting in the Office of the State Department of Health concerning the issuance of a nursing home license. The grand jury was looking into irregularities in the issuance of the license, but found no evidence of criminal activity. Rather than examining the defendant about the event, the prosecutor questioned the defendant about testimony he had given before another investigating

It was not until three cases were heard by the New York Court of Appeals,[194] however, that the troubling and complex issue of the perjury trap crystallized and, as a consequence, provided the impetus for that court to fashion coherent and meaningful standards. The three cases involved the same basic issue: whether the prosecutor interrogated the witness in the legitimate pursuit of evidence or the illegitimate pursuit of perjury. The witnesses were a supplier of paper goods to nursing homes (Pomerantz), a bailbond agent (Schenkman), and a judge of the Supreme Court of the State of New York (Tyler). As to Pomerantz and Schenkman, the court found the interrogation proper; as to Tyler, the court found the interrogation improper.

Joshua Pomerantz, a paper goods supplier of a number of nursing homes in the New York metropolitan area, was summoned by a special grand jury investigating abuses in the Medicaid reimbursement program including the payment of "kickbacks" by suppliers to nursing home owners. Ten months earlier, the special prosecutor secretly recorded a conversation between Ira Feinberg, a nursing home owner operating as an undercover agent, and Pomerantz. During the conversation, Pomerantz described an "arrangement" involving a percentage of the monthly bill to the home, fictitious invoices, and "special deals," presumably referring to a

body. The court, in dismissing the perjury counts, found that "the whole purpose [in questioning Blumenthal] was to frame [a perjury] indictment." *Id.* 8, col. 4.

In People v. Brust, N.Y.L.J., Dec. 2, 1976, at 12, col. 4 (Sup. Ct.), Joseph Brust, a justice of the Supreme Court of New York, was questioned before a special grand jury about whether certain of his judicial actions had been corruptly influenced. He was indicted for giving false answers. The defendant, an elderly and ill man, was questioned before the grand jury about a conversation he had with a city councilman seven months earlier. The conversation, wiretapped with court approval, concerned a request by Brust to the councilman for personal favors at a time when the councilman represented a party in an important case being heard by Brust. The court, however, found that the interrogation of Brust was calculated solely to develop and preserve perjury counts. Brust was questioned about details that had occurred several months earlier, there was a legitimate possibility of honest memory lapses, and the prosecutor did nothing to refresh the witness's recollection. In sum, the prosecutor did not ask specific questions directed at developing accurate information but, rather, set out to trap the witness into lies.

In People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (1980), Paul Rao, Jr., a lawyer, was called before a grand jury investigating corruption in New York City and interrogated about a mock crime that the prosecutor had invented as a means of investigating official corruption. Rao's answers, contradicted by tape recordings, formed the basis of the perjury counts of which he was convicted by a jury. In dismissing the indictment, the court concluded that the questions put to him were not material to any investigation into corruption but, rather, were "tailored . . . solely to entice and trap him into giving false answers." *Id.* 98, 425 N.Y.S.2d at 129.

[194] People v. Schenkman, 46 N.Y.2d 232, 385 N.E.2d 1214, 413 N.Y.S.2d 284 (1978); People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978); People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978).

"kickback" scheme.[195] Granted transactional immunity before the grand jury, Pomerantz was asked whether he had ever solicited business from a nursing home owner with the understanding that a percentage could be added onto the bill by the owner and whether he had ever met or solicited business from Ira Feinberg.[196] Based

[195] People v. Pomerantz, 46 N.Y.2d at 244, 385 N.E.2d at 1220, 413 N.Y.S.2d at 291.

[196] The interrogation of Pomerantz with respect to Feinberg follows:

"Q. Have you ever done any business or solicited any business from the Manor Nursing Home in Emerson, New Jersey?

"A. I don't remember.

"Q. That is run by a Mr. Ira Feinberg?

"A. I don't recall.

"Q. Have you ever met Mr. Feinberg?

"A. I don't remember.

"Q. Mr. Feinberg also runs the Manor Nursing Home in Tenafly, New Jersey?

"A. I don't know where Tenafly is.

"Q. Well, have you ever met Mr. Feinberg?

"A. I don't remember.

"Q. Is it possible?

"A. Sure, it is possible."

. . . .

"Q. Once again I want to ask you whether you have ever met or solicited business from Mr. Ira Feinberg who had or has nursing home interests in among others the Manor Nursing Home at Tenafly, New Jersey, and the Manor Nursing Home in Emerson, New Jersey?

"A. I don't remember, I don't remember, the name does not strike—the name, I don't remember the name.

"Q. Is it possible?

"A. It is—sure, it is possible.

"Q. Well, how likely is it?

"A. I don't know.

"Q. Do you have any recollections at all of meeting Mr. Ira Feinberg?

"A. None at all. I don't know where those places are."

. . . .

"Q. Have you ever heard of or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors inflating their bills to nursing homes?

"A. Just what I read in the papers.

"Q. You have no personal knowledge of that practice?

"A. No, sir.

"Q. You have never engaged in that practice yourself?

"A. No, no sir.

"Q. Have you ever heard or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors giving extra bills or invoices to nursing homes?

"A. Just what I read in the paper.

"Q. You have never engaged in that practice yourself?

"A. No."

"Q. I want to be very clear on this, to the best of your knowledge has any nursing home owner, operator, administrator, or other employee that you have solicited business from ever in words or substance requested or asked you for any special deals so that he can make a few dollars?

"A. I cannot remember every person who I dealt with in business if that ever came across."

"Q. Mr. Pomerantz, have you ever said, suggested, or told any nursing home owner, operator, administrator, or other employee in words or substance that he can have 10% added onto his bills?

on his denials to both of these inquiries, Pomerantz was indicted and convicted of perjury.

Ida Schenkman was summoned before a grand jury investigating the crimes of criminal usury and extortion in connection with two $1000 payments that she allegedly made to Vincent Rizzo, a suspected "loanshark," nine and four months earlier. The prosecutor learned of the transactions through an intercepted telephone conversation between Rizzo and a third party. Granted transactional immunity, Schenkman was extensively interrogated about the loans.[197] At times evasive, she tacitly conceded that the loans

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"A. You've asked me the question four times already.

"Q. Please answer. This will be the last time in that form at least.

"A. I must say I don't recollect ever having offered anyone in any way any type of kickback."

"Q. Have you ever said, suggested, or acknowledged in any way to any nursing home owner, operator, administrator, or other employee that you would add on 10% on their bills and then give them back the 10% in cash?

"A. I cannot recall making such a statement.

"Q. If you had made such a statement you would recall it, would you not?

"A. I sure would.

* * * * * *

"Q. I want you to listen to my questions very carefully because they are different. Have you ever told any nursing home owner, operator, administrator, or other employee in effect that you give other people in the nursing home industry 10% inflated bills?

"A. To the best of my recollection I don't remember ever making such a statement.

"Q. Have you ever said, suggested, or told any nursing home owner, operator, administrator, or other employee that when you make such deals it is on that basis, meaning on the basis of a 10% inflated bill?

"A. To the best of my recollection I don't remember making such a statement."

Id. at 245-47, 385 N.E.2d at 1221-22, 413 N.Y.S.2d at 291-92.

[197] Schenkman was asked more than 1000 questions, a "significant portion" relating to the Rizzo loans. The following is illustrative:

"Q. Did you ever pay [Rizzo] $1,000 at one time on this loan?

"A. Did I ever pay him back a 1,000?

"Q. Yes, on this particular loan?

"A. No, I don't think so. I don't remember, I will be honest with you, I really don't.

* * * * * *

"Q. * * * on March 28, 1972, did you pay a person called Fatso $1,000?

"A. I don't remember. I really don't.

"Q. Did you tell Vincent Rizzo that you did?

"A. I don't remember.

* * * * * *

"Q. Do you remember giving him $1,000?

"A. Yes, I do.

"Q. You did give him $1,000?

"A. Yes, but I don't know what date.

* * * * * *

"Q. How often have you paid Vincent Rizzo $1,000 at one time?

had been made but testified that she could not recall the precise dates or the purpose of the transactions, nor did she have any records to assist her recollection.[198] On account of her responses, she was indicted for perjury and contempt and convicted of contempt.[199]

Andrew Tyler was summoned before a special grand jury investigating corruption in the New York City criminal justice system. The grand jury was investigating, *inter alia,* Tyler's relationship with certain gambling figures, including Raymond "Spanish Raymond" Marquez, reputed head of one of the largest gambling syndi-

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"A. Not very often.
"Q. How many times?
"A. Oh, on two or three occasions.
"Q. Within the past year? Within the past, say from October 1971 to the present, how many times have you paid him $1,000?
"A. Maybe twice.
"Q. Okay. You remember the two times you paid him $1,000?
"A. No, I don't remember, sir.
* * * * * *
"Q. [The two payments of $1,000 were] to repay the loan, the money he gave you?
"A. That is right, to defray the loan, yes.
* * * * * *
"Q. Why did you pay him $1,000?
"A. In order to keep good faith.
* * * * * *
"Q. * * * on March 28th, 1972, you paid Patty Marino a $1,000, is that correct?
"A. I don't remember that, I really don't.
"Q. Was it the early part of March, March 28th, 1972?
"A. I don't remember that.
"Q. Do you deny paying Patty Marino a $1,000 on March 28th, 1972 with a promise to pay another $1,000 soon after?
"A. I don't remember that.
"Q. Do you deny it happening?
"A. I don't remember it sir.
"Q. All right. Isn't it a fact that yesterday you told this grand jury that you remember that you paid him a $1,000?
"A. Well, why should he give me $4,000. I don't remember that then."

People v. Schenkman, 46 N.Y.2d at 235-36, 385 N.E.2d at 1215-16, 413 N.Y.S.2d at 286.

198 *Id.* at 235, 385 N.E.2d at 1215, 413 N.Y.S.2d at 285.

199 In New York, criminal contempt, N.Y. PENAL LAW § 215.51 (McKinney 1975), in some circumstances, is closely related to perjury. This is true, for example, in cases in which the contempt is predicated on a false and evasive profession of an inability to recall or on contradictory responses repeatedly altered. *See* note 29 *supra. See also* People *ex rel.* Valenti v. McCloskey, 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959), *appeal dismissed,* 361 U.S. 534 (1960). In such cases, the evasive contempt is tantamount to a perjury that is apparent from the face of the record. That is, "testimony which is so plainly *inconsistent,* so manifestly *contradictory* and so conspicuously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth." *Id.* (emphasis in original) (quoting Finkel v. McCook, 247 A.D. 57, 63, 286 N.Y.S. 755, 761, *aff'd,* 271 N.Y. 636, 3 N.E.2d 460, 288 N.Y.S. 409 (1936)).

cates in New York.[200] Members of a police surveillance team testified in detail before the grand jury that ten months earlier, shortly after Marquez's release from federal prison, he met Tyler in Manhattan, apparently by prearrangement. The two drove to a nearby restaurant where they remained for over an hour before leaving together, Tyler driving Marquez back to his parked car.[201] When questioned initially before the grand jury about his relationship and dealings with Marquez, Tyler stated that he had represented Marquez several years earlier in a gambling case but since becoming a supreme court justice had not communicated with him.[202] Recalled to the grand jury two months later, Tyler was again questioned about Marquez.[203] On this occasion he corrected his

[200] People v. Tyler, 46 N.Y.2d at 254-55, 385 N.E.2d at 1226, 413 N.Y.S.2d at 297.

[201] *Id.*

[202] *Id.* at 255, 385 N.E.2d at 1226-27, 413 N.Y.S.2d at 297.

[203] The defendant explained at his trial that a discussion he had with his wife following his earlier appearance had refreshed his recollection. After he recalled meeting Marquez, the interrogation continued:

"Q. [Y]ou testified before that you saw him on occasion when he was being transported by federal marshals. You said that was the only time you'd seen him since you'd become a judge. Is that the occasion you're talking about?

"A. No, that's not the occasion I'm talking about.

"Q. What is the occasion that you're talking about?

"A. I saw him on an occasion when he was with his wife on 58th Street in Manhattan.

"Q. When was that?

"A. I couldn't fix the dates. Probably somewhere around May. May of '75, somewhere around there.

"Q. Can you describe that in any more detail, that meeting or encounter or whatever it was on 58th Street?

"A. Yes. It was outside of Patsy's Restaurant. I think that's where it was.

"Q. What were you doing? Were you walking down the street, driving, in the restaurant? What was—

"A. I was on my way into Patsy's.

"Q. What happened?

"A. I saw him and his wife.

"Q. What did you do?

"A. We greeted each other, asked him how he was. He asked me how I was. Asked me how things were getting along, and I asked him the same thing.

"Q. This was out on the street?

"A. That was on the street. Then they walked into Patsy's and I walked into Patsy's.

"Q. Were you alone or with anyone else?

"A. I was alone. I was waiting for my daughter.

"Q. What happened after you went into Patsy's?

"A. I think I had a drink.

"Q. Was there a bar there, or did you have it at the table?

"A. Sitting right at the entrance of the door, I had a drink at the door.

"Q. Did you have a drink alone?

testimony, stating that he had met Marquez "[p]robably somewhere around May of '75 . . . outside of Patsy's Restaurant." [204] Tyler testified further that he entered the restaurant with Marquez, but stayed only "ten or fifteen minutes" before leaving alone.[205] The prosecutor asked Tyler about the subject matter of their discussion; Tyler responded that they had discussed Marquez's "health." [206] Tyler was indicted, tried, and convicted of perjury.

In *Pomerantz* and *Schenkman,* the court of appeals found that the prosecutors interrogated the witnesses in good faith for the purpose of establishing evidence of antecedent crimes. The prosecutor's aim in *Pomerantz* was not perjury but "flushing out the truth." [207] Thus, to jog the witness's memory, the prosecutor re-

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"A. No. He and his wife sat down.
"Q. How long did that take?
"A. About ten or fifteen minutes.
"Q. What happened then?
"A. I got up and left.
"Q. And they remained in the place?
"A. I believe so.

* * * * * *

"Q. Did you have a previous arrangement to meet with Mr. Marquez at that location?
"A. No, sir.
"Q. It was purely chance?
"A. Yes, sir.
"Q. When you arrived there did you — withdrawn. What did you discuss during the course of that meeting with Mr. Marquez?
"A. How he was, basically.
"Q. Had he recently come out of prison?
"A. I understood that he had, yes.
"Q. Was that part of the discussion?
"A. Yes.
"Q. Anything else except his health?
"A. That's all. Health and what he planned to do.
"Q. Did he tell you what he planned to do?
"A. He said he intended to take it easy.
"Q. And that was the extent of the conversation?
"A. In substance.
"Q. Can you remember anything else that was discussed?
"A. No, I can't, because it was just chit-chat.
"Q. Did he discuss with you any matters that were in the courts at that time?
"A. No, sir.
"Q. Did you discuss any of the — did he discuss the fact that the people in his organization had been arrested?
"A. No, sir."

Id. at 256-58, 385 N.E.2d at 1227-28, 413 N.Y.S.2d at 297-98.

[204] *Id.* at 256, 385 N.E.2d at 1227, 413 N.Y.S.2d at 297-98.

[205] *Id.*

[206] *Id.*

[207] People v. Pomerantz, 46 N.Y.2d at 243-44, 385 N.E.2d at 1220, 413 N.Y.S.2d at 290. Interestingly, the prosecutor in his summation admitted wanting "to trap Joshua Pomerantz." *Id.* at 249, 385 N.E.2d at 1223, 413 N.Y.S.2d at 294. In justifying this remark, the court of appeals observed: "If indeed a trap

ferred to Feinberg by name on three different occasions and also referred by name to the nursing home.[208] Further attempts to stimulate the witness's memory, for example, by mentioning the precise date of the prior meeting or by reading portions of the transcript of the conversation [209] were held to be not required because "[t]he subject matter of the meeting should have made it memorable [to Pomerantz]." [210] Moreover, "the prosecutor's repetition and restatement [of questions] provided ample cues to stimulate defendant's recollection." [211] It would be "unreasonable" to suggest that the defendant's recollection would have improved had the precise date of the meeting been furnished him.[212] "Nor should the prosecutor be required to confront the defendant with the recording, lest he conform his testimony to what was already known and fail to add to the prosecutor's knowledge." [213]

Similarly, in *Schenkman,* the nature of the event that was the subject of the interrogation was pivotal in the court's assessment of the prosecutor's motive. Schenkman was an "astute operator" who dealt frequently with considerable sums of money; it would be "incredible" that she would not accurately recall the payments to Rizzo.[214] "[O]ne may be sure that the seasoned defendant, because it would be crucial to her, remembered precisely how and why and for what she had repaid Rizzo." [215] Although the prosecutor apparently made no reference to the recorded conversation, he was not obliged to do so because he "gave the defendant ample cues to stimulate her recollection" by repeating, restating, and elaborating questions directed to the subject matter of the inquiry.[216]

The court of appeals, distinguishing *Pomerantz* and *Schenkman,* held that *Tyler* demonstrates "an unmitigated effort to trap the witness on minor outward details of a single meeting with a reputed criminal figure." [217] The prosecutor made "no attempt to establish that the meeting was pertinent to a proper substantive

was set, it was aimed not at perjury, but at flushing out the truth." *Id.* at 243-44, 385 N.E.2d at 1220, 413 N.Y.S.2d at 290.

[208] *See* note 196 *supra.*

[209] *Id.* at 249, 385 N.E.2d at 1223, 413 N.Y.S.2d at 293-94.

[210] *Id.* at 243, 385 N.E.2d at 1220, 413 N.Y.S.2d at 290.

[211] *Id.*

[212] *Id.* at 249, 385 N.E.2d at 1223, 413 N.Y.S.2d at 294.

[213] *Id.*

[214] People v. Schenkman, 46 N.Y.2d at 237-38, 385 N.E.2d at 1217, 413 N.Y.S.2d at 287.

[215] *Id.* at 238, 385 N.E.2d at 1217, 413 N.Y.S.2d at 287.

[216] *Id.*

[217] People v. Tyler, 46 N.Y.2d at 259-60, 385 N.E.2d at 1229, 413 N.Y.S.2d at 300.

goal of [the] Grand Jury investigation." [218] The meeting, although "perhaps indiscreet," [219] could easily have been an innocent "chance encounter." [220] "[A]t no time did the prosecutor, either by repetition, restatement, or elaboration, press defendant into giving a convincing narrative of what indeed went on at the restaurant." [221] Because the prosecutor made "no palpable effort" to demonstrate "that the meeting was material to the Grand Jury investigation," [222] false answers relating to "peripheral" and "logistical" details of the meeting were held insufficient to support a prosecution for perjury.[223] Moreover, the prosecutor made no effort to stimulate the defendant's memory with the information already acquired by the surveillance team to ascertain whether the witness was genuinely unable to recall "details of no memorable significance." [224] Because the intrinsic significance of the event was slight, the prosecutor should have made a meaningful effort to refresh the witness's recollection. By failing to do so, he demonstrated his "preoccupation with trapping defendant into committing perjury." [225]

The New York Court of Appeals has taken significant steps towards providing meaningful and realistic standards for prosecutorial conduct. Nevertheless, the court's attempt to distinguish the aforementioned cases raises difficult questions. As noted earlier, the court's principal inquiry is to determine whether the grand jury conducted an honest investigation to "flush out the truth." Thus, the court initially evaluates the significance of the event that is the subject of the interrogation to determine not the extent to which it was material to the investigation but whether it should have been "memorable" to the witness.[226] The conversations be-

[218] *Id.* at 260, 385 N.E.2d at 1229, 413 N.Y.S.2d at 300.
[219] *Id.* at 261, 385 N.E.2d at 1230, 413 N.Y.S.2d at 301.
[220] *Id.* at 260, 385 N.E.2d at 1229, 413 N.Y.S.2d at 300.
[221] *Id.*
[222] *Id.*
[223] The court observed that the prosecutor interrogated Tyler "as if he were conducting only a quiz to test memory or recall." *Id.*
[224] *Id.* at 260-61, 385 N.E.2d at 1230, 413 N.Y.S.2d at 300.
[225] *Id.* at 262, 385 N.E.2d at 1231, 413 N.Y.S.2d at 301.
[226] The court seems to be confusing the concept of "materiality" with "memorability." Initially, the court states: "Nor need materiality be discussed." *Id.* at 258, 385 N.E.2d at 1228, 413 N.Y.S.2d at 299. Later in the opinion, however, the court notes that the prosecutor failed to demonstrate "that the meeting was material," *id.* at 260, 385 N.E.2d at 1229, 413 N.Y.S.2d at 300, and "evinced minimal or no interest in establishing the materiality of the meeting," *id.* The court goes on to discuss the significance of the meeting in determining whether it "should have been memorable." *Id.* at 261, 385 N.E.2d at 1230, 413 N.Y.S.2d at 301. Perhaps the court is saying that although an event may be material as an abstract matter of law—and interrogation concerning a meeting between a judge and a reputed mobster is clearly material—it may not be material or "significant" in terms of the witness's ability to remember the event without some stimulation.

tween Pomerantz and Feinberg about nursing home fraud and the conversation between Schenkman and Rizzo about loans were viewed by the court to be significant and therefore memorable. The conversation between Tyler and Marquez, however, was viewed as not memorable.[227]

After subjectively assessing the memorability of a particular event, the court then decides how vigorously the prosecutor must stimulate the witness's recall in order to insulate his questioning from attack as a perjury trap. The prosecutor in *Tyler,* for example, did not probe sufficiently deeply to demonstrate a good faith inquiry; in contrast, the prosecutors in *Pomerantz* and *Schenkman* did. This analysis is problematic. If the only proper purpose of interrogation of a witness before a grand jury is to "flush out the truth," [228] the prosecutors in all three cases should have been obliged to provide the witnesses with the information already in the grand jury's possession in order to stimulate recollection,[229] and thus increase the scope and value of the witness's testimony. The court's fear that by doing so the prosecutor might provide the witness with an opportunity to tailor his testimony probably overestimates a witness's ability to conform testimony to incriminating or embarrassing evidence, and may also underestimate a prosecutor's ability to probe the evasion and demonstrate its falsity. Indeed, if truth is the objective of the investigative questioning, then the prosecutor is, in most cases, no further from the truth by confront-

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[227] One might legitimately question whether a meeting between the reputed head of one of the largest illegal gambling enterprises in New York and a high ranking judge is any less memorable than a conversation ten months earlier between a supplier of more than thirty nursing homes and an owner, or a reference to two $1000 loans by a bail bond agent who regularly deals in huge sums of money. The conversation between Tyler and Marquez may have been difficult to remember, although, on its face, a lengthy encounter between a member of the judiciary already under investigation for other alleged irregularities and a major "crime figure" just released from prison does not appear totally innocuous or easily forgettable. In any event, the significance of the meeting or its inconsequentiality was precisely what the grand jury was investigating and, one would expect, quite legitimately. Tyler, who had already fabricated the "peripheral" and "logistical" details of the meeting, was asked no less than eight different times what he and Marquez had talked about. It is unclear from the court's discussion whether asking eighteen or one-hundred different questions in varying restatements and repetitions would have made any difference in the result.

To be sure, the prosecutor in *Tyler* was not as fortunate as the prosecutors in *Pomerantz* and *Schenkman.* He did not have a record of the critical conversation, nor a witness to provide "memorability" to the event. He could rely on only the "logistical details" and question the witness on the intrinsic details. Query whether denials by Pomerantz and Schenkman about the single fact that there had been a conversation would be sufficient to sustain a perjury prosecution.

[228] *See* note 207 *supra.*

[229] *See* note 98 *supra.*

ing the witness with contradictory information to refresh recollection than he is by the attenuated probe approved by the court in *Pomerantz* and *Schenkman*.

Several important considerations have been addressed by the New York Court of Appeals. To divine a prosecutor's purpose—the critical inquiry—requires an assessment of the nature and significance of the event under investigation, and of the interrogation techniques used to stimulate the witness's memory. If the event is deemed significant, the prosecutor is not required to make as thorough an effort to refresh the witness's recollection as would be necessary if the event were considered insignificant. If the prosecutor has made no palpable attempt to demonstrate the event's significance and has failed to provide the witness with sufficient facts to enable him to testify truthfully, it might be concluded that the prosecutor's purpose was to extract perjury. The court, however, cautions against application of any "formalistic" rule that would permit a prosecutor to frame his questions to create the appearance of a legitimate inquiry.[230] The court remarked that it was "concerned with substance, not form," [231] reflecting an appreciation that no precise guidelines can be issued in the complex and dynamic setting of a grand jury. This is particularly true in light of the fact that the court's test involves relative judgments about the significance of an event, its memorability, whether the witness's memory was stimulated and to what extent, and the interest exhibited by the prosecutor in thoroughly investigating the event.

Returning to the White hypothetical, the event that is the subject of the examination—the telephone conversation with Singer—appears much less significant than the conversations in *Pomerantz* and *Schenkman* and no more significant than the meeting in *Tyler*. The conversation was not shown to be memorable to White, and no effort was made to stimulate his memory. As in *Tyler*, the prosecutor appeared more interested in catching White in contradictions about details of the conversation with Singer than in interrogating the witness about his knowledge of corruption. Although it is not entirely clear that White was the victim of a perjury trap,[232] apparently such a defense would be successful, under the reasoning in *Tyler*.

[230] People v. Pomerantz, 46 N.Y.2d at 250, 385 N.E.2d at 1224, 413 N.Y.S.2d at 294; People v. Schenkman, 46 N.Y.2d at 239, 385 N.E.2d at 1218, 413 N.Y.S.2d at 288.

[231] People v. Pomerantz, 46 N.Y.2d at 250, 385 N.E.2d at 1224, 413 N.Y.S.2d at 294.

[232] In a case somewhat similar to the White-Singer example, a court determined that the grand jury "had a reasonable basis for believing that an effort may

IV. A Proposed Test and its Implementation

A. *Prosecutorial Purpose*

Although the due process clauses of the fifth and fourteenth amendments place some restraints on the conduct of grand jury proceedings,[233] the Supreme Court has never reversed a perjury conviction on the ground that the grand jury proceedings violated the guarantee of due process. The Court has indicated, however, that due process, in some circumstances, might mandate reversal of a perjury conviction.[234] These circumstances would have to be extreme given the Court's present view of perjury. Insofar as the grand jury serves its legitimate purposes[235]—the discovery of past crimes and the identification of persons to be charged—an act of perjury by a grand jury witness is rightly viewed as an affront to the integrity of the truth seeking process. As a consequence, the Supreme Court has upheld perjury indictments over claims that the government impermissibly asked questions, theorizing that the witness has other testimonial options open to him but that "lying is not one of them." [236]

But to the extent that the grand jury is used to serve an illicit purpose—the prosecutor's contrivance of an act of perjury by a witness—the act of perjury should not merit that same condemnation. When the prosecutor structures the grand jury proceedings with the purpose of trapping a grand jury witness in perjury, he abuses both the perjury sanction and the grand jury. Indeed, one might say that, in extreme cases, the prosecutor is using the grand jury process to solicit present crime rather than to investigate crimes already committed. Unless courts restrain such grand jury tactics, there is little reason to think that prosecutorial zeal will curb itself and, consequently, governmental abuses will go unremedied.

As noted earlier, it would be difficult to label such conduct by a prosecutor as entrapment in the technical sense, either because

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have been made corruptly to influence [judicial proceedings]" and that the grand jury "could have reasonably believed that each of these defendants had relevant information." People v. Rao, N.Y.L.J., March 17, 1977, at 14, col. 6 (Sup. Ct.). The court was unable to conclude that the proceeding "was designed solely, and for no other valid purpose than to produce perjury." *Id.*

233 *See* notes 27 & 28 *supra* & accompanying text.

234 United States v. Mandujano, 425 U.S. 564, 583 (1976) (plurality opinion); *id.* 585 (Brennan, J., concurring); *id.* 609 (Stewart, J., concurring).

235 *See* text accompanying notes 81-84 *supra.*

236 Bryson v. United States, 396 U.S. 64, 72 (1969). *See* notes 50-53 *supra* & accompanying text.

the prosecutor concededly did not put the words in the mouth of Remington or of Lazaros, for example, or because the traditional "predisposition" test of *Sorrells* and *Sherman* cannot meaningfully be applied to a perjury trap. Nevertheless, this willful perversion of the grand jury's legal function surely falls within that category of discreditable government conduct that, under either the objective or the due process standard of entrapment, should bar the government from realizing its gains.[237] The problem is to distinguish situations in which the prosecutor deliberately induces perjury from those in which, in the course of an honest and legitimate probe for information, he discovers an act of perjury on the part of a dishonest witness.

On reflection, and after considering the legal elements of the perjury trap, three questions emerge. First, what test should be employed in determining whether a perjury trap was set? Second, what criteria should be considered in deciding whether this test has been met? Third, what procedure should be used in making these determinations? None of these questions is easily answered.

As we have seen, the formulation that courts most often articulate in attempting to identify a perjury trap is whether the *sole and exclusive* purpose of the prosecutor was to extract perjury.[238] As one might expect, this test is so restrictive that it affords virtually no protection at all from prosecutorial abuse. The notion of a "sole and exclusive" purpose is divorced from reality because investigative grand jury proceedings are inherently dynamic, wide-ranging explorations with frequently unpredictable results. In these proceedings the prosecutor has a variety of objectives, motives, interests, beliefs, suspicions and competing considerations that might merge inextricably. The requirement of a singleness of purpose on the prosecutor's part is, therefore, an unrealistic, and consequently unmanageably subjective standard.

Despite these complexities, some courts have purported to identify and condemn a prosecutor's "sole and exclusive purpose" in particular perjury cases.[239] The decisions of these courts invite criticism precisely because, even in the most blatant cases, legitimate,

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[237] *See* notes 76-78 *supra* & accompanying text.

[238] *See* note 15 *supra* & accompanying text. Some courts, however, are reluctant to make any inquiry into the prosecutor's motivation. *See, e.g.*, United States v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974) ("Since the questions were material to the grand jury's investigation, we doubt that we can inquire into the motivation for asking them."), *cert. denied*, 426 U.S. 911 (1976).

[239] *E.g.*, Brown v. United States, 245 F.2d 549 (8th Cir. 1957); People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978). *See* notes 138 & 193 *supra*.

information-seeking objectives may be hypothesized. Thus, in *Brown v. United States*,[240] the case most often cited for the application of the "sole and exclusive purpose" rule, a Nebraska grand jury—a "roving commission"—questioned Brown about a matter so lacking in relevance that the prosecutor was held to have intended solely to trap Brown into committing perjury. Even in the circumstances of *Brown*, however, a court might have found legitimate purposes to coexist with the illicit one. For example, the court could plausibly have argued that the prosecutor genuinely sought, and indeed would have welcomed, truthful testimony about corruption. In short, the "sole and exclusive purpose" rule is both artificial and subjective, for a court can always discount an illicit purpose in light of an expansively viewed prosecutorial objective of securing information. In those other procedural contexts in which courts are typically required to examine the prosecutor's good faith, the standards are more realistic.[241]

It is necessary at this point to distinguish the perjury trap from a situation commonly encountered, for example, in investigations into organized crime. Frequently, a prosecutor, summoning a witness before the grand jury, will expect with some confidence that the witness will give false answers to the questions put to him. The prosecutor's *expectation* that perjury will be committed—a matter of prosecutorial experience and judgment—is totally distinct from the prosecutor's active *design* to cause perjury to be committed. If the prosecutor's expectation of perjury were a bar, plainly such a test would hamper grand jury investigations, particularly in cases in which witnesses whose testimony might aid the investigation are hostile to the inquiry and could be expected to obstruct the search for truth. Such witnesses might perjure themselves with impunity, claiming that the prosecutor called them with the expectation that they would give false testimony. Further, because a court might confuse expectation with intent (in the sense that, in theory, one is deemed to have intended the probable consequences of his act), the "expectant" prosecutor might be held to have intended the commission of an act of perjury solely as a result of his reasonable, and otherwise innocent, anticipation. It might well be that the prosecutor's reasonable apprehensions will be borne out, but expectation alone is a consideration that should not weigh against

[240] 245 F.2d 549 (8th Cir. 1957).

[241] *See, e.g.*, United States v. Dinitz, 424 U.S. 600 (1976) (double jeopardy); Dickey v. Florida, 398 U.S. 30 (1970) (speedy trial); Sheppard v. Maxwell, 384 U.S. 333 (1966) (pretrial publicity); Brady v. Maryland, 373 U.S. 83 (1963) (pretrial discovery).

the prosecutor. Nonetheless, one would expect that the anticipation of false testimony would lead a competent prosecutor to probe the witness's response with greater skill and intensity in order to ferret out the truth.

Thus, just as the "sole and exclusive purpose" test is overly artificial, it would be unduly burdensome to bar prosecution if the prosecutor was found to have *any* intent—however remote—to elicit false testimony. Under this test, unless a prosecutor used every available technique to dissuade a witness from committing perjury—for example, by offering the witness a "last clear chance" to retract or recant[242]—it might be argued that the prosecutor harbored a design to obtain a perjury conviction and, hence, that the defendant should go free.

For instance, assume that a grand jury has summoned a witness suspected of being involved in loansharking activities, and that incriminating evidence in the form of tape recorded conversations has been introduced before the grand jury. The prosecutor hopes the witness will testify truthfully but *expects* that the witness will refuse to testify or will answer the questions evasively or will perjure himself. In his interrogation of the witness, the prosecutor does not disclose to the witness the incriminating recordings. To reveal them, the prosecutor believes, might compromise the investigation. Lurking, no doubt, in the back of the prosecutor's mind is the thought—and possibly the intention—of trapping the witness in a lie. If a court later determines that perjury was at least one probable consequence of calling the witness, and if the court applies the test postulated, a subsequent perjury prosecution would be barred. The adverse impact on effective law enforcement would be considerable, and might indeed weaken perjury as a sanction for false testimony.

B. *The Dominant Purpose Test*

This examination of two relatively extreme tests does not, of course, end the inquiry. We have seen that a test that unrealistically postulates a sole and exclusive prosecutorial purpose affords virtually

[242] Retraction or recantation of a false statement is usually an affirmative defense to perjury if it can be demonstrated that such retraction or recantation was made (1) during the proceeding in which the false statement was made; (2) before the false statement substantially affected the proceeding, and (3) before it became manifest that its falsity was or would be exposed. *See* 18 U.S.C. § 1623(d) (1976); N.Y. PENAL LAW § 210.25 (McKinney 1971). *But see* United States v. Norris, 300 U.S. 564 (1937) (holding under the general federal perjury statute, 18 U.S.C. § 1621 (1976), that a witness who intentionally lies to a grand jury may not later purge himself by recanting).

no safeguard from abuse. A test that would set the perjurer free if the prosecutor harbored any design to catch the witness in such a crime has equally unacceptable consequences. In order to avoid these extremes, and to ensure that both individual rights and the needs of legitimate investigation are accorded proper respect, a more balanced test might be formulated as follows: If, in light of the circumstances elaborated below, it could be shown that a prosecutor's overriding or "dominant purpose" is to extract perjury, then prosecution for that perjury should be barred. While avoiding the restrictiveness of the exclusive purpose test, this test still requires a substantial showing that the prosecutor acted in bad faith. Such a test in no way undermines the utility of the perjury sanction but, rather, provides a more meaningful and objective standard to evaluate one aspect of due process in the context of grand jury proceedings. The dominant purpose test has, moreover, the added benefit of being familiar to courts, because it figures in evaluating other claimed prosecutorial abuses of the grand jury.[243] It is an effective standard, and it is demonstrably well-suited to a claimed perjury trap, as will be seen presently.

In the application of this dominant purpose test, several important considerations must be isolated: [244] (1) the subject matter of the grand jury's investigation; (2) the relationship of the witness to the investigation; (3) the importance of the questions put to the witness to the subject matter of the investigation; (4) the extent to which the prosecutor behaves consistently with his standard operating procedures; and (5) whether the methods of interrogation were reasonably related to bringing out the information sought from the witness.

The starting point is the nexus between (1) the subject matter of the investigation and (2) the witness's purported relationship to the subject matter. This nexus determines the witness's ability to illuminate areas into which the grand jury is inquiring. Only by

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[243] In United States v. Dardi, 300 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964), the court stated: "'It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial.'" *See also* United States v. Doe (Ellsberg), 455 F.2d 1270, 1273 (1st Cir. 1972); United States v. Kovaleski, 406 F. Supp. 267 (E.D. Mich. 1976). In People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, *cert. denied*, 426 U.S. 953 (1976), the court inquired into the "primary intent" of the police in conducting a search and seizure. *Id.* 178-79, 347 N.E.2d at 610, 383 N.Y.S.2d at 249.

[244] Theoretically, independent evidence in which a prosecutor directly reveals his purposes, such as out-of-court statements or internal documents might be available. Most prosecutors, however, could be expected to avoid creating such evidence, particularly those setting perjury traps. Consequently, this form of evidence of purpose will likely be unavailable.

addressing such issues can one make a threshold determination (3) how directly the questions put to the witness relate to the subject matter of the investigation. If the questions relate directly to the subject matter of the investigation, at least at this preliminary juncture, the prosecutor should be deemed to have established a prima facie showing of good faith. The pivotal question at this point should be how close a relationship exists between the questions asked of the witness and the subject matter of the inquiry: Do the questions bear directly and pointedly on the matter under inquiry, or are they of only marginal significance? If they bear directly, no further inquiry into the prosecutor's purpose need be made at this stage; he is clearly executing his official duties. If, however, the questions are only marginally related to the investigation, one may properly question the prosecutor's motivation for probing into matters of slight significance.

To be sure, the test proposed above bears some resemblance to the materiality inquiry in standard perjury prosecutions.[245] Virtually all perjury statutes require the false statement to be "material" in order to secure a conviction.[246] In view of the attenuated concepts of materiality that have been articulated in the context of the various federal and state perjury statutes,[247] this requirement is of little practical value. In addition, the inquiry proposed above goes beyond the traditional notion of materiality and requires examination of the likely importance of the prosecutor's questions. Consequently, questions that would satisfy the materiality standard of perjury statutes might nonetheless, when considered in conjunction with other circumstances of the case, contribute to an ultimate finding of prosecutorial bad faith.[248]

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[245] For a discussion of materiality, see note 97 *supra*.

[246] *See id.*

[247] *E.g.*, United States v. Percell, 526 F.2d 189, 190 (9th Cir. 1975); United States v. Tyrone, 451 F.2d 16, 18 (9th Cir. 1971); United States v. Neff, 212 F.2d 297 (3d Cir. 1954). *See* note 97 *supra*.

[248] The *Lazaros* case, discussed at text accompanying notes 144-58 *supra*, provides an example of a situation in which a prosecutor's questions might satisfy the materiality requirement of perjury statutes, yet be found suspect under the standards of materiality and importance proposed above. Although the questions put to Lazaros were abstractly material—they did concern the subject matter of the investigation—other considerations raise substantial doubts concerning their actual importance. Apparently, every person accused by Lazaros had already testified before the grand jury, denying under oath his accusations. The prosecutor believed their testimony and the investigation was winding up. Yet, he also knew that Lazaros would have to repeat his earlier statements made to the government investigators. Although the Sixth Circuit held that Lazaros's statements were nonetheless material, the inquiry proposed above casts grave doubts on the prosecutor's motivation in such a situation. In sum, although there was technical perjury, its elicitation was probably the product of an improper prosecutorial trap.

In the White hypothetical, for instance, if the interrogation had been closely related to the subject matter of the grand jury probe—corruption and official misconduct—and White's knowledge of corrupt activities, White's false testimony would almost certainly justify an indictment for perjury. The questions that were posed, however, were not likely to uncover White's knowledge of corruption. The questions were only superficially linked to the investigation's subject matter, and could be expected to accomplish little more than the procurement of an acknowledgment or denial of a statement that the grand jury knew that he had made. Without a further showing of importance to the grand jury investigation, the interrogation appears designed to trap the witness into testimony that the prosecutor knows can be refuted.

Closely related to the importance of the questions in the abstract—that is, an assessment of how closely the questions relate to the subject matter of the investigation—is a consideration of how they relate to the particular witness. Although a prosecutor's questions may be important on their face, the following hypothetical demonstrates that further analysis may be needed. Assume that based on knowledge that White had been associated with X, Y, and Z more than ten years ago, the prosecutor asks White: "Do you know X?" "Did you ever speak to Judge Y?" "Did you ever discuss a pending legal case with Z?" Assume further that X, Y, and Z are now suspected of having engaged in corrupt acts. White's answers, false or not, would be relatively insignificant if the prosecutor does not suspect that White had any recent contact with the subjects under investigation. Thus, it may be that the questions are significant in the abstract, but that this particular witness, as the prosecutor well knows, cannot provide the grand jury with meaningful information. The witness may, however, give false testimony in response to these abstractly important—but concretely unimportant—questions.[249] Similarly, in a case in which the prosecutor and grand jury are already in possession of the proven answer to the question—the recorded conversation in the White-Singer example—there is obviously no prospect that anything the witness

[249] In United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972), a grand jury investigating X for illegal interstate gambling questioned Lococo, who was also implicated in gambling. Lococo denied that he had spoken to X within the past year although evidence showed that he had telephoned X a few times during that time. Even though there was no showing of the relevance of these calls, the court held that the question was material to the investigation because "Lococo's false statement curbed the flow of information to the grand jury. We cannot say that his diversion did not tend to influence the investigation." *Id.* 1199.

says about such matters will add new information.[250] This is not to suggest that such questions are impermissible—they are frequently indispensable to an effective and thorough grand jury investigation. Insofar as such interrogation may lend itself to trickery rather than to legitimate inquiry, however, such questions should be scrutinized carefully.

In the above examples, good reason exists to believe that, because the prosecutor did not probe to uncover crime, his questioning was designed to elicit the subsequent perjurious statements. If a prosecution for perjury follows, the prosecutor should be required to demonstrate that his questions were asked for a valid reason and not merely to establish an inconsistency on a matter peripheral to the investigation. Following up this inquiry, there may or may not be further elements indicating a perjury trap. For example, indications of a perjury snare might be found in a case in which the prosecutor, apparently content with a perjury indictment, desists from any further questioning of the witness.[251] The dismissal of a witness or the termination of a line of inquiry once a perjured statement has been obtained strongly supports a conclusion that genuine information was not the prosecutor's objective.

Having discussed various aspects of the concept of materiality in order to discern the prosecutor's dominant purpose, a further area of inquiry is (4) the extent to which the prosecutor inextricably deviates from ordinary operating procedures.[252] Such behavior could, of course, take many forms. If, as is likely,[253] it is standard practice to advise grand jury witnesses of their rights, deviation from this custom ought to require explanation. The threat of contempt, coupled with a failure to advise a grand jury witness of certain legal protections—for example, his privilege against self-incrimination—would naturally lead many witnesses to speak when they might otherwise remain silent. It seems self-evident that a witness unaware of his status in the investigation, uninformed of his privilege against self-incrimination, and not cognizant of his right to the assistance of counsel would be more likely to act foolishly or rashly and succumb to the temptation of perjury than would a witness apprised of his rights and effectively assisted by counsel.[254]

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[250] *See* note 160 *supra.*

[251] *See, e.g.*, People v. Davis, 74 A.D.2d 801, 426 N.Y.S.2d 5 (1980).

[252] *See* text accompanying notes 184-87 *supra.*

[253] *See* note 88 *supra.*

[254] *See* note 36 *supra.*

Similarly, deviation from ordinary practices might take the form of the expenditure of inordinately large amounts of scarce prosecutorial time and resources on obtaining a perjury conviction, which usually would not be a primary concern. If a prosecutor's behavior deviates markedly from established procedures, and if no explanation for the unusual actions is offered,[255] it appears reasonable to consider this, along with other circumstances, in determining the prosecutor's purpose.

An inquiry into the significance of the questions, the importance of the witness's testimony, and the prosecutor's procedures are of considerable importance in evaluating the prosecutor's dominant purpose. Such considerations, however, are not conclusive. A court must necessarily examine (5) the *methods* of interrogation—perhaps the most critical consideration in attempting to uncover the prosecutor's dominant purpose for interrogating the witness. We have already seen how the prosecutor, under the guise of a superficially material examination, may seek to elicit perjury. Just as traditional concepts of materiality may be distorted and misused,[256] so may the manner of questioning. Thus, a prosecutor seeking to trap a witness into committing perjury may use arguably ambiguous terms calculated to trick the witness. Questions like "Do you *know* A?" "Were you *involved* with B?" "Did you *discuss* C?" seem superficially innocuous. Most courts would probably find these questions sufficiently unambiguous to uphold a perjury conviction,[257] and, indeed, in most circumstances, they would be unobjectionable. Such questions, however, would also be useful to a prosecutor seeking to set a perjury trap. Although sufficiently unambiguous to support a technical perjury offense, their vagueness is sufficient to afford the prosecutor an opportunity to trap unwary or careless witnesses.

A prosecutor, in addition to playing on the ambiguity of certain words, might also phrase his questions in misleading ways. Thus, going back to our example, questions to White involving the

[255] This consideration should be examined with considerable care to minimize interference with the internal affairs of the prosecutor's office. It would be disastrous to inhibit innovative or experimental actions by prosecutors. The test proposed above, however, is unlikely to have any chilling effect on prosecutorial creativity. Presumably, prosecutors adopt unusual courses of action for explainable reasons or in response to articulable problems. In such cases, a legitimate explanation for the deviation can be made to the court. Only in cases in which the deviation from standard operating procedures was for the purpose of trapping a defendant into committing perjury will the prosecutor find it difficult to provide a legitimate explanation for his unusual behavior.

[256] *See* text accompanying notes 245-48 *supra.*

[257] *See* text accompanying notes 259-63 *infra* and note 92 *supra.*

terms "intervene," "influence," and "fix" do not appear to have been used to probe for information. Rather, they were being used to convey a sinister tone to the earlier conversation, to confuse the witness, and to elicit a denial that the prosecutor would later argue was uttered intentionally with knowledge of its falsity.

Just as the use of ambiguous terms might be employed to trick the witness, so might the pattern of questioning. For example, assume the grand jury has heard evidence that witness A, a judge, talked with B, an attorney, about a case presently pending before Judge A in which attorney B represented one of the litigants. The conversation was indiscreet but far from incriminating. The grand jury learned that Judge A decided the case in favor of attorney B's client, and that the decision was arguably inconsistent with law. In short, the prosecutor suspects a "fix." Aware that he is unable to prove a substantive violation, a prosecutor looking for perjury might ask Judge A (1) whether Judge A ever received any gift or favor from any litigant or his attorney while their case was pending before the judge; (2) whether Judge A ever discussed the receipt of any gift or favor from any litigant or his attorney while their case was pending before the judge, and (3) whether Judge A ever had any ex parte discussion with any litigant or his attorney about a case while it was pending before the judge.

Assume that the prosecutor has no basis for asking questions 1 and 2 and knows that the witness can honestly answer in the negative. In these circumstances, a pattern of narrow, tightly worded questions followed by a broad, arguably ambiguous question might be misleading. The witness, perhaps lulled into a belief that the prosecutor is probing for a specific type of information, might be tempted to avoid a potentially embarrassing answer to the third question.[258] In this example, that the prosecutor possessed evidence that Judge A had spoken with attorney B strongly suggests a deliberate design to create a perjury offense. In sum, the prosecutor's pattern of questioning and the surrounding circumstances will be relevant in determining whether a perjury trap has been set.

Returning to our hypothetical, in the grand jury interrogation the prosecutor asked White (1) "Did you tell Singer that he should get a lawyer who could influence the D.A.?" (2) "Did you tell Singer that he should get a lawyer who could fix things with the D.A.?" (3) "Did you tell Singer that your brother could quash things with

[258] Of course, the witness might have answered falsely because he did not remember the conversation, and the prosecutor did nothing to stimulate his recollection. *See* text accompanying notes 264-68 *infra*.

the D.A.?" The prosecutor could have intended that White, confused by the questions but believing that he could properly deny the statements attributed to him in questions 1 and 2, also might deny the statement in question 3 after weighing the embarrassment stemming from an affirmative reply against the risk that his perjury would be discovered.

The prosecutor's method and pattern of questioning is, of course, subject to scrutiny in determining whether a perjury offense was actually committed. Virtually all perjury statutes define perjury as requiring a "knowing" or "willful" false statement.[259] Courts have generally interpreted this requirement as prohibiting perjury convictions based on unduly vague or ambiguous questions: [260] a perjury offense does not lie "where the question is so vague that the witness is unable to answer with knowledge of its meaning," [261] or "where the question propounded admits of several plausible meanings." [262] Yet, the vagueness test, as traditionally articulated, has resulted in relatively few acquittals.[263]

The inquiry into the prosecutor's method and pattern of questioning proposed in connection with perjury trap analysis, however, is not so narrowly limited. Rather, the prosecutor's questions will be analyzed from the perspective of their likely purpose. Questioning that manifests no intent to "flush out the truth," or to accomplish any other legitimate purpose, would thus contribute to a finding of prosecutorial bad faith. Similarly, questioning which, although sufficient to sustain a technical perjury conviction, was still ambiguous, tricky, or misleading could contribute to the finding of a perjury trap.

An issue related to the prosecutor's use of ambiguous or misleading words or a tricky sequence of questions to trap a witness is the extent to which the prosecutor must stimulate the recollection of the witness. Examples of such stimulation include restating questions, providing cues, and actually confronting the witness with evidence that contradicts his answers and exposes his perjury. The extent to which a witness's memory must be stimulated is a difficult problem. Its resolution may depend on a number of considerations: the witness's age, intelligence, and facility for recollection; the intrinsic significance or memorability of the event under inquiry, and

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259 *See* note 3 *supra.*

260 *See* note 92 *supra.*

261 O'Connor v. United States, 240 F.2d 404, 405 (D.C. Cir. 1956).

262 United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967).

263 *See* cases cited note 92 *supra.*

the precision of the questions and their capactiy to effectively convey to the witness the nature of the information that is being sought. Thus, mere repetition or restatement of the question might be meaningless if the question itself is not readily comprehensible to the witness. With these considerations in mind, the failure of the prosecutor to stimulate recall or, conversely, his acceptance and preservation of a perjurious response without further attempts to probe the answer to determine if the witness is intentionally falsifying, might, in some circumstances, suggest bad faith.

Going back to our example involving White, there is plainly a "memorability" problem exploited by the prosecutor. The event—a ten-minute conversation between White and Singer—happened four months earlier and, being a brief talk between a political leader and a friend, was probably of small significance to White. The prosecutor asked vague and confusing questions, did nothing to stimulate White's recollection, and desisted from further questioning after obtaining the denials. The combination of these circumstances strongly suggests that the prosecutor ambushed White into perjury.

Whether a prosecutor should be required to refresh the witness's recollection is a question worth considering, especially when we recall that the objective of a grand jury investigation is a search for truth. The courts generally agree that the prosecutor has no duty to lay a foundation before subjecting a witness to indictment for perjury on account of false responses.[264] Nor do the courts require that the prosecutor actually confront a witness with his prior statement itself, either through reading from the transcript, playing the tape recording, or familiarizing him with any other witness's contradicting testimony.[265]

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[264] *See* note 98 *supra.*

[265] *See id.*

Interestingly, a New York appellate court, in a recent decision reinstating a dismissed perjury indictment over a "troublesome" claim of a trap, suggested that the prosecutor should have confronted the witness with the contradictory information. People v. Steiner, N.Y.L.J., Oct. 14, 1980, at 1, col. 6 (App. Div. Oct. 7, 1980). In *Steiner*, in the course of a grand jury probe into corruption in nursing homes, the defendant, an administrative official in one of the homes under investigation, was summoned as a witness and given immunity. The defendant conceded that kickbacks had been paid when he was hired, but denied any personal knowledge or involvement in any kickback scheme. Three suppliers testified some months prior to the defendant's testimony that they had paid kickbacks to the defendant, such testimony forming the basis for a three count perjury indictment. The appellate division reversed the order of the trial court dismissing the indictment, finding that the failure of the prosecutors to further inquire of the defendant about the specific event, however "unaccountable," did not constitute entrapment "as a matter of law." The court observed: "No reason appears as to why the prosecutor did not do so. . . . The prosecutor should confront the wit-

It is a basic rule of evidence that before one may impeach a witness by use of a prior inconsistent statement, one must first confront the witness with the contents of the statement and the time, place, and person to whom the statement was purportedly made.[266] This rule of evidence is routinely applicable in trials that are adversarial in nature, but is not applicable in nonadversarial grand jury proceedings.

A primary purpose of both a trial and grand jury proceedings is to "flush out the truth." From a policy perspective, therefore, it appears anomalous to countenance less reliable truthseeking proceedings in the grand jury than at trial. Indeed, there would be good reason to require that ex parte inquisitions without the oversight of a neutral magistrate be subject to more stringent safeguards than are open, public proceedings before a judge.

With these policy considerations in mind, although the dogma that a grand jury witness need not be confronted with inconsistent evidence is of too ancient an origin to be rejected out-of-hand, it is not inappropriate to consider the prosecutor's attempts to refresh a witness's recollection in ascertaining his purpose. Even if one wholeheartedly accepts the traditional rule, there is little, if any, basis for objecting to such a consideration. Even if it is assumed to be appropriate in ordinary, legitimate grand jury investigations, the traditional rule does not, by its terms, purport to apply to cases in which the grand jury has been subverted and put to an improper use. Similarly, the rule merely provides that prosecutors need not confront grand jury witnesses with inconsistent evidence. It does not say that whenever the prosecutor avails himself of this protection, his action will be shielded from inquiries into his good faith and into the witness's due process rights. Thus, if a prosecutor has made little or no real attempt to procure information from a witness—by refreshing his recollection or otherwise—one might properly suspect an illegitimate purpose to procure perjury.

Two common justifications for not requiring confrontation of the grand jury witness with inconsistent evidence are that such dis-

ness with the substance of the contradictory information known to the prosecution in an effort to determine the truth and advance the substantive purpose of investigation." *Id.* 17, col. 4.

Presumably, because the court determined that the events under investigation were "memorable," this apparently lessened the prosecutor's obligation to provide the witness with additional memory stimulation. But, if that is so, then it is unclear why the court required the prosecutor to probe further. It seems that in this borderline case, the court was exceedingly dubious about the prosecutor's purpose, but not sufficiently so to find that the purpose "was an attempt to lead (the defendant) . . . into the box canyon of entrapment." *Id.*

[266] *See* note 98 *supra.*

closure might impinge on the secrecy rule and that it might enable the witness to obstruct the grand jury's inquiry by conforming his testimony. Neither justification survives close analysis. The grand jury secrecy rule has little, if any, relevance to the examination of a witness. The requirement that grand jury proceedings be conducted in secrecy originally arose to protect grand juries from government intimidation and reprisal.[267] Today, however, the rule is predicated on a number of considerations, notably preventing the escape of the accused; ensuring freedom of grand jury deliberations; preventing subornation of perjury or tampering with witnesses; encouraging witnesses to appear before the grand jury and speak freely without fear of reprisal; and preventing the disclosure of information adverse to an an individual under investigation who has not been indicted.[268] Neither the language nor the purposes of the secrecy rule are necessarily infringed by confrontation of a grand jury witness with contrary evidence or by a prosecutor's basing his questions on information already before the grand jury. The prosecutor may, in certain situations, elect not to convey to the witness matters before the grand jury if, for example, such disclosure could not be structured so as to avoid compromising the investigation or a prior witness. This is not to say, however, that the prosecutor may structure his interrogation in a deliberate attempt to extract perjured testimony, and then claim that the secrecy rule prevents more honest, open, and effective questioning.

With respect to a witness's tailoring of his testimony, we have noted earlier that the ability of a witness to evade skillful interrogation should not be exaggerated. A witness could probably provide an innocent explanation with respect to outward or minor details of an event. Thus, questioned about his meeting with a reputed mobster, Judge Tyler might innocently explain that the meeting was a chance encounter between former friends and that they discussed each other's health. If the prosecutor had evidence of a conversation in which the Judge discussed the fixing of a case, however, it would be far more difficult for Judge Tyler to provide an "innocent" explanation. Rather, a skillful examiner should be able to force the witness to disgorge the truth or, by careful and probing interrogation, solidify a case of perjury.

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[267] *See* Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Note, *The Grand Jury Powers, Procedures and Problems*, 9 COLUM. J.L. & SOC. PROB. 681, 707-08 (1973).

[268] *See* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958).

This is not to say that a prosecutor is required to disclose his entire file to the witness. Assuming that the information in the prosecutor's or grand jury's possession is relevant to the interrogation and might induce truthful responses, the prosecutor's failure to confront the witness with such information is one consideration in assessing his purpose in interrogating the witness. This consideration would be particularly relevant in a case in which the witness's ability to recall the event is questionable, in which the significance of the event is slight, or in which the questions are ambiguous or misleading.

C. *Perjury Trap Procedure*

Finally, having discussed the considerations that are important in an application of the proposed dominant purpose test, we should consider one remaining matter, namely, the procedure by which a claimed perjury trap should be resolved. Under the majority formulation of the entrapment rule, the defendant has the burden at trial of producing evidence in support of his claim of entrapment and, having done so, affirmatively persuading the jury that he was entrapped. Thus, the defendant must demonstrate that he "is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." [269] But under the objective formulation of the rule, as well as under a due process test looking to the police methods in luring the defendant into crime, the issue of entrapment would be an appropriate question of law for the court and not a question of fact for the jury.

Two rationales have been advanced in support of this latter procedure. The first, articulated by Justice Roberts in *Sorrells v. United States,* reflects an overriding concern for the integrity of the court.

> The protections of its own function and the preservation of the purity of its own temple belongs only to the court.

[269] Sherman v. United States, 356 U.S. 369, 373 (1958); Sorrells v. United States, 287 U.S. 435, 452-53 (1932); N.Y. PENAL LAW § 40.05 (McKinney 1971); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 373 (1972). As suggested above, *see* note 60 *supra,* this procedure poses serious evidentiary consequences for a defendant who seeks to avail himself of the entrapment defense. Because the issue of predisposition is the controlling question, the defendant's prior criminal record becomes logically relevant to whether he was predisposed to commit the crime for which he is being tried. There is the obvious danger, however, that a jury might improperly use the defendant's past criminal conduct on the substantive issue of guilty notwithstanding a finding of entrapment on the merits. *See* Jackson v. Denno, 378 U.S. 368 (1964).

> It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.[270]

The second rationale, expressed by Justice Frankfurter in *Sherman v. United States,* relates to the development of more efficient and fair police practices.

> Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.[271]

As we have seen, however, the majority's "predisposition" standard is meaningless as a defense to perjury. The issue in the perjury trap is not whether the defendant was subjectively predisposed to commit perjury but whether the government acted improperly in soliciting the crime. Viewed as such, entrapment would be a question of law for the court, for the reasons advanced by Justices Roberts and Frankfurter. First, trapping a witness into perjury is a "prostitution of the criminal law" [272] and the courts must protect their integrity from such abuse. Second, only by condemning such conduct through aborting prosecutions will the court deter misuse of the prosecutor's power and thereby give "significant guidance for official conduct in the future." [273]

As a question of law, therefore, the claim of entrapment should properly be submitted to the court prior to trial, either in the form of a motion to suppress the defendant's grand jury testimony or,

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[270] Sorrells v. United States, 287 U.S. at 457 (Roberts, J., concurring).

[271] Sherman v. United States, 356 U.S. at 385 (Frankfurter, J., concurring). Apparently, some federal courts, contrary to the Roberts-Frankfurter view, send to the jury under appropriate instructions the issues of both police conduct and the defendant's predisposition. *See* United States v. Anderson, 356 F. Supp. 1311 (D. N.J. 1973), *discussed in* Park, *supra* note 58, at 188.

[272] Sorrells v. United States, 287 U.S. at 457 (Roberts, J., concurring).

[273] Sherman v. United States, 356 U.S. at 385 (Frankfurter, J., concurring). The role of the court in instances of government overreaching in soliciting crime is quite similar to the court's role in areas of other alleged constitutional violations. *See* Jackson v. Denno, 378 U.S. 368 (1964) (coerced confession); Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search and seizure).

alternatively, to dismiss the indictment. In either case, logically the result would be the same; without the defendant's testimony there is no evidence upon which to base a perjury charge. Because the defendant is authorized to have a transcript of his grand jury testimony before trial,[274] he would have some objective basis for claiming that the prosecutor's overriding purpose was to trap him into committing perjury. On the basis of the defendant's motion and the government's response, the court could decide the issue on the papers or, if necessary, take some sworn testimony at an adversary hearing.[275]

Once the defendant has established prima facie that the prosecutor's dominant purpose in interrogating him was to elicit perjury, then the burden properly should shift to the government to demonstrate that its dominant purpose was lawful.[276] The government is in the best position to show the reasons for summoning the defendant as a witness and for interrogating him in the manner being challenged. Moreover, to require the government to demonstrate fairness and honesty would serve as an additional safeguard to protect the integrity of the grand jury and the due process rights of witnesses. Like the exclusionary rule was intended to be,[277] the proposed test for the perjury trap and its procedures for enforcement should become largely a prophylactic guide to curb prosecutorial abuses. The proposed test would furnish the courts with a clear yet flexible standard to replace the current tangle of confused legal doctrine.

CONCLUSION

From the abusive prosecutorial methods condemned by Learned Hand in the red-menace era to today's aggressive use of the grand jury to uncover white-collar, organized, and official crime, the courts have only sparingly addressed the problem of the perjury trap. This might be the case because perjury is considered so obnoxious to our system of justice that the courts are naturally reluctant to develop a new doctrine to relieve a defendant of his willfully false testimony. Added to this consideration is the specu-

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[274] *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(A).

[275] For example, such a hearing was conducted in United States v. Lazaros, 480 F.2d 174 (6th Cir. 1973).

[276] In United States v. Kovaleski, 406 F. Supp. 267 (E.D. Mich. 1976), the court placed the burden on the government to demonstrate that its dominant purpose in calling the witness before the grand jury was not to gather evidence for use in a pending trial.

[277] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

lative nature of the claim, difficult of proof, that the prosecutor's purpose was to extract perjury. As we have seen, however, discussing this problem directly illuminates the secret and generally misunderstood nature of grand jury proceedings, and the prosecutor's role in investigating crime. Particularly today, when prosecutors are energetically using grand juries as law enforcement adjuncts, the courts must be increasingly attentive to such proceedings to ensure that the enormous power vested in prosecutors and grand juries does not become a "tool of tyranny."

With respect to the hypothetical case of witness White, I think it is clear that the prosecutor's *dominant purpose* in summoning and interrogating White was to elicit perjury. Under the broad, traditional concepts of materiality, the questions put to White were theoretically material to the investigation because they might have influenced the tribunal to take or desist from taking action. Under the notion of importance proposed above, however, the questions were of marginal significance. The grand jury already knew the answers, there was no specific claim of influence peddling that the grand jury was investigating, and it is highly conjectural that the improper suggestions by White had any meaningful relationship to substantive crime. Further, one would expect that most prosecutors, rather than being content with cursory false responses, would have probed further beyond the falsehood in order to bring out the truth. The prosecutor made no effort to do this. He wanted a perjury indictment.

In conclusion, one is reminded of an ex parte examination by an attorney general of a witness implicated in a crime considered quite serious by the government. The interrogator, shifting focus from the main subject of the inquiry, perhaps to lay a foundation for a perjury charge, began to ask: "Do you know one John Wharton?" "How long?" "Do you know Edmund Chillington?" "How long?" The witness replied:

> Why do you ask me all these questions? These are (not) pertinent . . . . I am not willing to answer any more of these questions, because I see you go about by this examination to ensnare me.

The tribunal was the Star Chamber.[278]

[278] Trial of Lilburn & Wharton, 3 How. St. Tr. 1315, 1318 (1637).